Supreme Court, U.S.
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No. _____

IN THE

# SUPREME COURT OF THE UNITED STATES

ALAN M. HOWARD, R. BORIS GREENBERG, KATHRYN PARAVENTI, and MERHDAD ETEMAD, on behalf of themselves, and on behalf of all others similarly situated,

*Petitioners,*

vs.

AMERICA ONLINE, INC., JAMES V. KIMSEY, STEPHEN M. CASE, and LENNERT J. LEADER,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR A WRIT OF CERTIORARI

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97 pp

## QUESTIONS PRESENTED

Whether America Online is a "common carrier" pursuant to the Federal Communications Act of 1934 and thereby subject to a tariff filing requirement regarding its Terms of Service?

Whether America Online may require its subscribers to grant it mandatory copyright licenses and other user rights in order to obtain its services?

## PARTIES TO THE PROCEEDING

Petitioners are Alan M. Howard, R. Boris Greenberg, Kathryn Paraventi, and Merhdad Etemad, on behalf of themselves, and on behalf of all others similarly situated.

Respondents are America Online, Inc., James V. Kimsey, Stephen M. Case, and Lennert J. Leader.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

## OPINIONS BELOW

The Ninth Circuit opinion (App. A) is reported at *Howard v. America Online, Inc.*, 208 F.3d 741 (9th Cir. 2000). The district court opinion granting Respondents'/Defendants' FED. R. CIV. PROC. 12(b)(6) Motion to Dismiss was not reported.

## STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 29, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

This case involves the Federal Communications Act of 1934, 47 U.S.C. § 151 et seq. (1998), the pertinent parts of which are attached hereto at App. B.

This case also involves the copyright laws of the United States, 17 U.S.C. § 101 et seq. (1998), the pertinent parts of which are attached hereto at App. C.

## STATEMENT OF THE CASE

### A. The Services Offered By AOL And Claimed By Petitioners To Be "Common Carrier" Activities.

AOL is a publicly held corporation which provides a number of services to its subscribers, including E-mail, public forums, and access to the Internet. AOL is also an owner and backbone provider of the Internet itself. The services provided by AOL utilize the wire and radio communications networks of the United States.

Petitioners are subscribers to and have utilized the services of AOL in both their personal and professional capacities. Petitioners contend that AOL is a "common carrier" pursuant to the Federal Communications Act of 1934 and thereby subject to a tariff-filing requirement regarding its Terms of Service, and that it cannot unilaterally impose unreasonable terms of service, such as requiring subscribers to grant perpetual reproduction rights to subscribers' intellectual property.

### B. Proceedings Below

On March 13, 1997, Petitioners filed their original complaint against America Online, Inc. Original jurisdiction was conferred upon the District Court as to the Federal questions raised in Appellants' complaint, pursuant to 28 U.S.C. § 1331 (1998), as to the Declaratory Relief requested therein, pursuant to 28 U.S.C. §§ 2201 and 2202 (1998), and as to the violations

of the Communications Act of 1934 (including failure on the part of Defendant AOL to file tariffs with the FCC), pursuant to 47 U.S.C. § 207 (1998). Jurisdiction over the California State causes of action arose under the doctrine of pendant jurisdiction, 28 U.S.C. § 1367(a) (1998).

The District Court, Hon. A. Andrew Hauk presiding, granted Respondents' motion to dismiss, with leave to amend, on September 22, 1997. Thereafter, Petitioners filed a First Amended Complaint (hereinafter "Complaint"). The district court dismissed the entire Complaint with prejudice, upon Respondents' Motion, pursuant to FED. R. CIV. PROC. 12(b)(6), 12(b)(1), and 9(b).

The Ninth Circuit Court of Appeals, having jurisdiction pursuant to 18 U.S.C. § 1291, affirmed the district court's order.

## ARGUMENT

### I.

### THE DECISION OF THE COURT OF APPEALS TO AFFIRM THE DISMISSAL OF PETITIONERS' CAUSE OF ACTION ASSERTING VIOLATIONS OF THE FEDERAL COMMUNINCATIONS ACT OF 1934 CONFLICTS WITH THE STATUTORY MANDATE OF CONGRESS AND THE DECISIONS OF THE SUPREME COURT.

Justice Scalia, writing for this Court in 1994, made it clear that the FCC was not empowered to "modify" tariff filing requirements to such a degree as to eliminate a filing requirement entirely for common carriers under the Federal Communications Act of 1934 ("the Act"):

> "[O]ur estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate-regulation filed-tariff system for common-carrier communications...[T]he Commission's desire 'to "increase competition" cannot provide [it] authority to alter the well-established stautory filed requirements.'...[S]uch considerations address themselves to Congress, not to the courts.'...[This] is effectively the introduction of a whole new regime of regulation (or of free-market competition), which may well be a better

> regime but is not the one that Congress established."

*MCI v. AT&T*, 512 U.S. 218, 234, 114 S.Ct. 2223, 129 L. Ed. 2d 182 (1994).

It is the contention of Petitioners that America Online, Inc. ("AOL") is a "common carrier" within the definition of the Act. For example, 47 U.S.C. § 153(10) provides that "The term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy... ."

Moreover, 47 U.S.C. § 153(43) defines "Telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." "Telecommunications carriers" that offer telecommunications to the public for a fee are treated as "common carriers" under the Act. 47 U.S.C. §§ 153(44), 153(46). Petitioners contend that AOL's status as a telecommunications carrier is indisputable, based upon the services that it actually provides to its subscribers.

This Court has defined a "common carrier" as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing...A common carrier does not 'make individualized decisions, in particular cases,

whether and on what terms to deal.'" *FCC v. Midwest Video Corp.*, 440 U.S. 689, 701, 99 S. Ct. 1435, 59 L. Ed. 2d 692 (1979) (alterations in original).

### A. The "Common Carrier" Nature Of AOL's Offerings To The Public Require Application Of The Federal Communications Act To AOL.

In January, 2000 AOL decided to acquire Time Warner, Inc. in the largest merger ever. AOL Chairman Stephen Case announced, "I don't think it's too much to say this is an historic moment, a time when we transform the landscape of media and communications." At the time, AOL supplied its communications services to more than 20 million monthly subscribers. By acquiring Time Warner, AOL is obtaining cable systems that reach about 13 million households.

AOL provides "Internet Telephony". On May 29, 2000, in a front-page news article about the public's burgeoning use of Internet Telephony, The Los Angeles Times reported the opinion of a telephone industry executive that, "The idea of America Online as a telephone company is not really farfetched". In fact, the Internet telephone service provided by AOL works by breaking up the sounds of callers' voices into a stream of digital packets on networked lines shared with Web page data, music and video. That same news article reported that, earlier in May, 2000, AT & T (the nation's largest long-distance telephone carrier) sharply cut its estimates of revenue growth in part because consumers are moving from basic wired long-distance

to wireless and Internet services at greater rates than anticipated.

AOL provides "AOL-TV". With this service, AOL's telecommunications services merge electronic mail ("e-mail"), real-time subscriber "chatting" and the ability to browse the "world wide web" with traditional television broadcast services. With AOL-TV, a communications box that is connected to a phone or cable line is connected to the user's television receiver. A wireless keyboard allows the television viewer to use AOL's instant-messaging software in order to "chat" with distant viewers in real time.

Subscribers watching live sporting events or other television programs can instantaneously communicate with each other. Eventually, viewers also will be able to instantly purchase products being advertised on the television. In reality, the functional distinctions between telephones, televisions and computers are being eliminated. Digital technology has allowed common carrier and telecommunication forms to improve, interface and enhance functionality.

For example, AOL is working with Motorola to bring instant messaging to telephones using the AOL network. Hand-held computers, such as the Palm Pilot send and receive AOL e-mail via telephone and radio technology. "Smart" telephones now regularly receive AOL transmitted e-mail.

Moreover, it should be recalled that the Internet technology and the computer network that made all of these advances possible were sponsored and advanced

by government funds and research. Many of these public-sponsored benefits, including a portion of the hardware, routers, connectors and interfaces that form the "back-bone" of the world wide web itself, were eventually obtained by AOL.

### B. The FCC Has Issued Unreasonably Arbitrary And Inconsistent Opinions.

AOL plays a dominant role as a common carrier of modern telecommunications involving more than 20 million people. Despite this, the Ninth Circuit has now given judicial approval to the FCC's wholesale exemption from the Act to all providers of "enhanced" telecommunications services, while providers of "basic" telecommunications services remain subject to the Congressional tariff filing regulation. In the opinion sought to be reviewed by grant of this Petition, a Circuit Court of Appeals, for the first time since Justice Scalia's pronouncement in 1994, has expressly recognized the FCC's right to create such an exemption from the mandate of Congress. Petitioners contend that only Congress may create such an exemption, and that it has not done so. Instead, the FCC has disregarded plain meanings in the Act and has struggled to find ways to avoid its logical application.

An example of its tortured reasoning is found in the FCC's labored conclusion that e-mail is not a "transmission, between or among points specified by the user, of information of the user's choosing." See *In The Matter Of Federal-State Joint Board On Universal Service*, 13 FCC Rcd. 11501, ¶78 (April 10, 1998). Virtually all modern technology involves electronic

changes unperceived by the user; when one's young child sends an e-mail claiming that you are the best grandparent in the world, what matters is that the precise message that has been sent is the one being received (misspellings and all). In each of these situations, the information sent and the information received are directed by the users, with the content unaffected by the transmission.

The content of services such as an e-mail message, real time chatting and Internet Telephony is "information of the user's choosing". The involvement of digital attachments and computer protocols do not add to or diminish the fact that the sender chooses content. In fact, AOL, in other litigation, has stipulated to this very fact: "There are a number of ways to communicate over the Internet. One such way 'via electronic mail, or "e-mail", comparable in principle to sending first class mail. One can address and transmit a message to one or more other people'." *Cyber Promotions, Inc., v. America Online, Inc.* 948 F.Supp. 456 (E.D. Penn. Nov. 26, 1996). Other AOL offerings, such as real-time Internet discussions, instant-messaging and chat rooms, are so purely within the definition of "telecommunications" common carriage as to defy alternate classification. These acts constitute common carriage, and should be identified as such by this Court, since the FCC refuses to give the Act a rational interpretation.

The FCC attempts to avoid the application of the "common carrier" definition to AOL (despite AOL's provision of services such as e-mail, instant chatting and Internet Telephony) by describing these services as

"enhanced". However, nowhere does the Act provide for an exemption for "enhanced services" provided by common carriers. Instead, this is the FCC's "policy-driven" exemption to the Act favoring certain common carriers, and it runs directly contrary to Justice Scalia's expression of this Court's opinion on the Commission's limited authority to alter the Act. [1]

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[1] In *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C.Cir. 1982) (hereinafter, "*Computer II*"), the D.C. Circuit permitted the FCC's regulatory forbearance ***only*** because the FCC substituted an alternative regulatory scheme over "enhanced" services. *Id.*, at 211. The Court emphasized that its sanction was narrow, saying:

> We emphasize, however, that our sanction is a very narrow one, given in light of the peculiar nature of the communications and data processing industries and the alternative regulatory scheme adopted by the Commission.

*Id.*, at 210. Today, this sanction is no longer valid. First, application of the decision in *MCI v. AT&T*, 512 U.S. 218 calls into question the very permissibility of a regulatory scheme wherein AT&T is the only provider required to sell enhanced services to itself through a separate subsidiary. And second, even if the sanction in *Computer II* were still valid on its face, the FCC is no longer enforcing this requirement, removing the ***only*** basis upon which the FCC's abdication of regulatory oversight was sanctioned by the D.C. Circuit.

### C. The Ninth Circuit Has Continued Its Improper Deference To The FCC's Arbitrary Regulatory Exemption For ISPs Engaged In "Common Carrier" Activities.

On June 22, 2000, the Ninth Circuit Court of Appeals issued an opinion which logically supports Petitioners' contentions herein in all respects, except for its continued improper acceptance of the FCC's arbitrary scheme exempting ISPs engaged in "common carrier" activities from the regulatory structure set forth in the Federal Communications Act. In *AT&T v. City of Portland*, ____ F.3d 6747; 2000 U.S.App. LEXIS 14383 (9th Cir. 2000), a Ninth Circuit panel held that AT&T's cable broadband network was "a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provided telecommunications to the public, 'regardless of the facilities used.' 47 U.S.C.S. 153(44) & (46)." *Id.*, at 6761.

Despite providing the same functional service that Petitioners unsuccessfully argued were "telecommunications services", in *AT&T v. City of Portland* the same Circuit declared AT&T's internet service provider, @Home, to be a "telecommunications service" subject to the Act. Similar to AT&T's @Home service, AOL's own network is utilized in two ways: Internet data passes *through* its network on a "common carrier" basis, while AOL's proprietary content is retrieved by users with queries *to* AOL's computer data storage facilities.

It has long been established that "one can be a common carrier with regard to some activities but not others." *National Association of Regulatory Utility Commissioners v. FCC*, 533 F.2d 601, 608 (D.C.Cir. 1976). And this fundamental principle has even been accepted by the FCC when it stated, "If a company provides both telecommunications services and information services, it must be classified as a telecommunications carrier." *Re Implementation of Local Competition Provisions*, 11 FCC Rcd. 15499, 15517 (1996). But inexplicably, neither the FCC, nor the Ninth Circuit, are willing to apply these principles to AOL, which engages in "common carrier" activities.

Nonetheless, the Court in *AT&T v. City of Portland* expressly cited to Petitioners' case and distinguished and treated AT&T differently from the AOL internet service that is the subject of this Petition. The Court attempted to justify the basis for this differential treatment in part, as follows:

> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are one of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a

> telecommunications service as defined in the Communications Act.

*Id.*, at 6762.

If this logic were extended, the Ninth Circuit presumably would find that MCI, Sprint and AT&T would no longer be "common carriers" under the Act because they do not control the entirety of facilities "from end to end". In fact, local exchange carriers connect long distance phone companies to consumers through the local exchange carriers' networks. A differential distinction between common carriers that is based upon ownership of the transmission network is found nowhere in the Act, and is contrary to this Court's own decisions that the FCC may not exempt resellers of "common carrier" services, many of which own no facilities whatsoever, from the tariff-filing requirements of the Act. *MCI v. AT&T*, 512 U.S. 218; *AT&T v. Centraloffice Telephone, Inc.*, 524 U.S. 214, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998). The result of the Ninth Circuit's reasoning is that telephone companies and broadband operators are made subject to the Act but ISPs are not. As a result, the world's largest ISP, AOL, provides telecommunications services for, and imposes terms of service upon, more that 20 million consumers of the nation's telecommunication network, all while "exempted" from an act of Congress that does not provide for its exemption.

Is AOL now such a "sacred cow" that our courts should create a policy that ignores a Congressional enactment requiring a minimally intrusive means of tariff posting? Is AOL to continue to be permitted (as part of its adhesive Terms of Service, without any tariff

posting pursuant to the Act) to obtain such benefits as a perpetual license to reproduce all copyrighted and intellectual property posted by subscribers in any electronic "public place"? Are latter-day Picassos, doodling the outline of a modern "Guernica" on an AOL "bulletin board", or budding Robert Frosts, communicating in their "chat rooms" about whether there are "miles" or "hours" to go before they sleep, unwittingly required to grant AOL commercial reproduction rights to their intellectual property? That is exactly what AOL has claimed in its electronic contracts.

AOL provides a fundamental and important telecommunications service. One of the instant petitioners, Kathryn Paraventi, was dependent on an AOL "chat room" and e-mail for information about the availability of organ transplants for her liver when, in 1996, AOL unilaterally converted to its flat fee program which caused modem overload due to user demand.

On October 29, 1996, AOL announced that it would begin pricing the AOL enterprise offering at $19.95 for "unlimited" access. When AOL announced the move to a Flat Fee Pricing Plan on October 29, 1996, AOL was aware that it could not provide adequate service. AOL was already experiencing problems with overloaded networks, a simple case of too many subscribers dialing into too few available modems. As of November of 1996, AOL had approximately 6 million members. At the same time, AOL had approximately 200,000 incoming lines connected to modems. The user to modem ratio at that time was roughly 30 to 1 (30:1). The industry standard amongst

Internet Service Providers for user to modem ratio at and about that time was 9.26:1.

This fiasco caused more than mere inconvenience to millions of Americans. As a result of AOL's private calculation, Ms. Paraventi could not gain access to the organ transplant support group "chat room" or the AOL subscribers upon whom she relied, since they could be reached only through AOL. It is beyond debate that AOL actually knew that its modems were woefully insufficient to provide service for the added phone traffic. Such a fundamental common carriage telecommunication service must not be subject to disruption or burden, without any public notice, hearing or warning, whenever AOL unilaterally decides that more reliable, or less profitable, telecommunication services should terminated or that subscribers' terms of service must be altered materially.

Petitioners believe that the Federal Communications Act provides the proper balance between the public interest and the growth of AOL. Only Congress, not the FCC or the courts, has the authority to re-write the Act.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED MARCH 29, 2000

ALAN M. HOWARD, an individual; R. BORIS GREENBERG, an individual; KATHRYN PARAVENTI, an individual; MEHRDAD ETEMAD, an individual; on behalf of themselves and on behalf of all others similarly situated, Plaintiffs-Appellants, v. AMERICA ONLINE INC., a Corp.; JAMES V. KIMSEY, an individual; STEPHEN M. CASE, an individual; LENNERT J. LEADER, an individual; DOE, individuals 1-50; ROE, entities 51-100, inclusive, Defendants-Appellees.

No. 98-56138

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

208 F.3d 741

February 14, 2000, Argued and Submitted, Pasadena, California

**Filed March 29, 2000**

**PRIOR HISTORY:**

Appeal from the United States District Court for the Central District of California. D.C. No. CV-97-01642-AAH. A. Andrew Hauk, District Judge, Presiding.

**COUNSEL:**

Alec B. Wisner and H. Scott Leviant, Stanbury & Fishelman, Inc., Los Angeles, California, for the plaintiffs-appellants.

Miles N. Ruthberg, Latham & Watkins, Los Angeles, California, for the defendants-appellees.

**JUDGES:**

Before: James R. Browning, Alfred T. Goodwin and Robert R. Beezer, Circuit Judges. Opinion by Judge Beezer.

**OPINION BY:**

Robert R. Beezer

**OPINION:**

BEEZER, Circuit Judge:

Plaintiffs Alan M. Howard, R. Boris Greenberg, Kathryn Paraventi and Merhdad Etemad ("Plaintiffs") sued America Online, Inc., James V. Kimsey, Stephen M. Case, Lennert J. Leader and 100 "Doe" and "Roe" defendants (collectively "AOL") for: violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. § § 1962*(c), 1962(d); violations of the Communications Act of 1934, *47 U.S.C. § § 151*-613; false advertising in violation of California Business and Professional Code § § 17500-17509; fraud and deceit; negligence; unfair business practices in violation of California Business and Professional Code § § 17200-17210; and declaratory and injunctive relief. The district court granted AOL's motion to dismiss. We have jurisdiction pursuant to *28 U.S.C. § 1291*, and we affirm.

I

Plaintiffs are subscribers of AOL, an "Internet (or information) service provider" ("ISP") that provides Internet access, electronic mail ("e-mail"), online conferencing and information directories, entertainment, software, electronic publications and original programming. *See generally 47 U.S.C. § 230*(f)(2) (West Supp. 1999) (defining interactive computer service). The individual defendants are officers who, according to Plaintiffs, managed AOL.

On March 13, 1997, Plaintiffs filed their original complaint, which claimed that AOL engaged in

fraudulent billing practices, securities fraud, fraud against a packaging supplier, fraudulent promotion of its "flat-fee" program, improper charges to subscribers and violations of its duty to protect subscribers' privacy rights and copyrights. The district court granted AOL's motion to dismiss, with leave to amend, on September 22, 1997.

Plaintiffs filed their first amended complaint ("complaint") on October 22, 1997. Although Plaintiffs moved for class certification under Federal Rule of Civil Procedure 23(b), the district court orally refused to grant the motion. AOL moved for dismissal, which the district court granted with prejudice on May 19, 1998. Plaintiffs appeal.

## II

"A dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is reviewed *de novo*. Review is limited to the contents of the complaint. All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Chang v. Chen, 80 F.3d 1293, 1296 (9th Cir. 1996)* (internal citations omitted).

The district court held that Plaintiffs failed to state a claim for violations of RICO. A violation under section 1962(c) requires proof of: "1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity." *Sedima S.P.R.L. v. Imrex Corp., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)* (internal note omitted). At issue is whether Plaintiffs properly alleged a pattern of racketeering activity.

A pattern is defined as "at least two acts of racketeering activity" within ten years of each other. *18 U.S.C. § 1961*(5). Two acts are necessary, but not sufficient, for finding a violation. *See H.J., Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 238, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).* "The term 'pattern' itself requires the showing of a relationship between the predicates and of the threat of continuing activity." *Id. at 239* (internal citation and quotation marks omitted).

**A**

The district court dismissed Plaintiffs' fraudulent billing claims, based on mail and wire fraud, because they had been settled in an earlier action and could not constitute predicate acts under RICO. Plaintiffs assert that they are not barred from using these claims as part of a pattern of racketeering activity. We disagree.

On March 18, 1997, the California Superior Court approved a settlement between AOL and a class of its subscribers. *See Hagen v. America Online, Inc.,* No. 971047 (Cal. Super. Ct. Mar. 18, 1997). The subscribers sued AOL for unfair business practices, fraud, breach of contract, unjust enrichment and negligent misrepresentation. The complaint alleged that AOL: failed to disclose connection and disconnection times; rounded up billing times; used misleading advertising regarding its hourly rate; unfairly calculated its service charge; improperly charged for downloading, delays, and time in "free areas"; failed to refund charges after cancellation; and made unauthorized withdrawals from checking accounts.

The *Hagen* class was defined as "all persons in the United States who at any time during the Class Period [July 14, 1991 to March 31, 1996] were subscribers of America Online Services." The settlement "permanently barred and enjoined" the class members from "asserting . . . against [AOL] any claims, rights, . . . of any nature, known or unknown, . . . which are alleged in the Amended Complaint, or which could or might have been alleged in the Amended Complaint and arise out of or are related to the matters referred to in the Amended Complaint."

In this case, Plaintiffs claimed violations of RICO, the Communications Act and California law proscribing false advertising, fraud and deceit, negligence and unfair business practices. The complaint stated that AOL: used both mail and wire fraud to improperly bill subscribers from 1992 to 1995; fraudulently manipulated its stock in 1995 and 1996; improperly billed for time in "free areas" from 1994 to 1996; improperly delayed cancellations from 1994 to "at least March 31, 1996"; made unauthorized withdrawals from subscribers' accounts; improperly used billing information and distributed false advertising related to its free trial program; made misrepresentations to PTP, a packaging company; and falsely promoted its "flat-fee" program. The proposed class included anyone who subscribed to AOL from March 13, 1993 to March 13, 1997; the complaint did not specify when Plaintiffs subscribed to AOL.

The district court found that Plaintiffs "clearly fall within the Settlement Class . . . . [They] have not presented any argument to the contrary; nor do they

claim to have opted out of the *Hagen* settlement class . . . . Plaintiffs' attempt to repackage the claims asserted and settled in *Hagen* as predicate acts under RICO is therefore barred."

"Where a judicially approved settlement is under consideration, a federal court may consequently find guidance from general state law on the preclusive force of settlement judgments." Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 375, 134 L. Ed. 2d 6, 116 S. Ct. 873 (1996). In California, interpretation of a settlement release is governed by contract principles. See General Motors Corp. v. Superior Court, 12 Cal. App. 4th 435, 15 Cal. Rptr. 2d 622, 625 (Cal. Ct. App. 1993).

The *Hagen* settlement unequivocally bars claims that "arise out of or are related to the matters referred to" in the complaint. Plaintiffs' RICO claims cite the identical billing allegations as *Hagen*. The settlement bars the use of these claims by the same parties. *See 15 Cal. Rptr. 2d at 626; see also Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287 (9th Cir. 1992)* ("[A] federal court may release . . . a claim based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented *and might not have been presentable in the class action.*") (emphasis in original) (internal quotation marks omitted).

Plaintiffs counter that the *Hagen* settlement does not apply because one of the Plaintiffs, Boris Greenberg, did not subscribe to AOL until 1997. This contention was not raised before the district court. "As a general rule, we will not consider an issue raised for

the first time on appeal . . . ." *Bolker v. Commissioner, 760 F.2d 1039, 1042 (9th Cir. 1985).* Even if we assume that Greenberg was not a subscriber until 1997, he was not damaged by AOL's actions prior to that time and cannot cite such allegations as RICO predicates. *See Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 366 n.4 (9th Cir. 1992).*

The district court also relied on claim preclusion as a bar to considering Plaintiffs' billing allegations as predicate acts. Plaintiffs contend that the RICO pattern was not completed at the time of the *Hagen* settlement, and that the acts at issue in *Hagen* can therefore be considered predicates. This argument is meritless.

Claim preclusion in federal court can be based on a state court settlement. *See Matsushita, 516 U.S. at 375.* The preclusive effect of a state court judgment in federal court is based on state preclusion law. *See Eichman v. Fotomat Corp., 759 F.2d 1434, 1437 (9th Cir. 1985).* "Under California law, a final judgment on the merits will preclude further litigation on the same cause of action." *Pension Trust Fund for Operating Eng'rs v. Triple A Mach. Shop, Inc., 942 F.2d 1457, 1460 (9th Cir. 1991)* (citing *Slater v. Blackwood, 15 Cal. 3d 791, 126 Cal. Rptr. 225, 226, 543 P.2d 593 (Cal. 1975)* (in bank)). A judicially approved settlement agreement is considered a final judgment on the merits. *See Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Ass'n, 60 Cal. App. 4th 1053, 71 Cal. Rptr. 2d 77, 84 (Cal. Ct. App. 1998).*

There is no support for Plaintiffs' contention that the *Hagen* class could not claim RICO violations because the requisite pattern had not yet developed.

Plaintiffs are part of the *Hagen* class and asserted identical billing claims that occurred during the same time period. *Cf. Gamble v. General Foods Corp., 229 Cal. App. 3d 893, 280 Cal. Rptr. 457, 460 (Cal. Ct. App. 1991)* ("Two actions constitute a single cause of action if they both affect the same primary right."). The *Hagen* class could have claimed a RICO violation based on the billing fraud. Plaintiffs were part of that class and are barred from subsequently bringing a claim that they could have made earlier. *See Pedrina v. Chun, 97 F.3d 1296, 1301 (9th Cir. 1996)* (applying claim preclusion because predicate acts could have been raised in earlier state court action); *Eichman, 759 F.2d at 1439* (holding that settlement agreement "does not preclude the pendent state claims in [the subsequent action] insofar as the latter alleges wrongful conduct occurring after the settlement date of the former"). *But see County of Cook v. MidCon Corp., 773 F.2d 892, 908 (7th Cir. 1985)* (stating that "where . . . only some aspects of an allegedly fraudulent scheme were at issue in the prior suit, a subsequent RICO action based on the entire scheme *presumably* would not be barred") (emphasis added).

Plaintiffs argue that the billing claims, even if inadmissable as predicate acts, can be used as evidence of a racketeering pattern because the pattern "forms the basis of the [RICO] violation, not the underlying acts themselves." To show a pattern under RICO, Plaintiffs must prove that there are a sufficient number of predicate acts "indictable" as mail or wire fraud. *See 18 U.S.C. § § 1961*(1)(B), 1962(c). Citing acts as a part of a RICO pattern, without proving that they are indictable, is not sufficient. *See Sigmond v. Brown, 828 F.2d 8, 9 (9th*

*Cir. 1987)* (holding that dismissal of RICO claim was appropriate where plaintiff did not present evidence that defendant committed mail fraud). Plaintiffs failed to allege a pattern of indictable billing claims.

We hold that the district court properly refused to consider the billing claims as RICO predicates.

**B**

Plaintiffs claimed that part of the RICO pattern was the inducement of PTP, a packaging supplier, to expand its operations based on AOL's misrepresentations about its shipping needs. The district court refused to consider this claim as a RICO predicate because the misrepresentations were not related to the other predicates, and Plaintiffs lacked standing to bring a claim for injuries to PTP. Because the district court properly held that this claim was unrelated to the other alleged predicates, we do not address the standing issue.

Establishment of a pattern "requires the showing of a relationship between the predicates and of the threat of continuing activity." *H.J., 492 U.S. at 239* (internal citation and quotation marks omitted). "Related" conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id. at 240* (internal quotation marks omitted).

We have not decided whether acts are "related" when they share only the same participants. Plaintiffs cite to the Second Circuit's statement that "the involvement of similar participants is sufficient to demonstrate a relationship among the predicate acts." *United States v. Simmons, 923 F.2d 934, 951 (2d Cir. 1991).* In spite of *Simmons,* the Second Circuit subsequently held in *Schlaifer Nance & Co. v. Estate of Warhol, 119 F.3d 91, 97 (2d Cir. 1997),* that, based on the facts of that case, predicate acts committed by the same participant were not related. The Sixth Circuit has also held that claiming identical participants alone is insufficient to establish relatedness. *See Vild v. Visconsi, 956 F.2d 560, 566-68 (6th Cir. 1992)* (holding that acts by same defendants against plaintiff are unrelated to acts against third parties); *cf. Hartz v. Friedman, 919 F.2d 469, 474 (7th Cir. 1990)* (holding that acts against the same victims are insufficient to establish relatedness).

The facts here illustrate why merely having the same participants is insufficient to establish relatedness. The purpose, result, victim and method of the PTP misrepresentations are strikingly different from the wire and mail fraud, stock manipulation and flat-fee advertising claims. To hold that Plaintiffs have established relatedness solely because they implicate the same participants makes that requirement virtually meaningless.

We affirm the district court's holding that the PTP misrepresentations are not related to the other claimed predicate acts and cannot be considered part of Plaintiffs' RICO claim.

C

Plaintiffs claimed that AOL committed securities fraud as part of a pattern of racketeering activity. In particular, Plaintiffs asserted that AOL misrepresented revenues, profits and number of subscribers; used improper accounting practices; and illegally sold stock at a profit. The district court held that Plaintiffs cannot use these claims to establish a RICO violation because of a statutory bar and because the claims lack relation to the other predicates. We agree.

The Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, 109 Stat. 737, 758 (Dec. 22, 1995), amended RICO so that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." *18 U.S.C. § 1964*(c) (Supp. II 1996). Plaintiffs argue that this amendment does not apply because they lack standing to bring securities fraud claims against AOL.

Section 1964(c) proscribes using as a predicate "any *conduct* that would have been actionable as [securities] fraud." (Emphasis added). Plaintiffs do not dispute that their securities fraud claims could be brought by a plaintiff with proper standing. The claims implicate "conduct that would have been actionable as [securities] fraud" and section 1964(c) bars their use as RICO predicates.

The district court held also that the securities fraud claims were not related to the other predicate acts. As noted, acts that share only the same

participants are insufficient to establish relatedness. The securities fraud claims have a different purpose, result, victim and method than the billing fraud, misrepresentations against PTP and the flat-fee advertising claims. Plaintiffs failed to show that the securities fraud claims are related to the other predicate acts.

We hold that Plaintiffs' securities fraud claims cannot be used to establish a RICO violation.

**D**

In October 1996, AOL started advertising its flat-fee program, which charged subscribers a monthly fee for unlimited Internet access, rather than the previous time charge. This change resulted in an overload of AOL's network, and prevented or delayed many subscribers' ability to access the Internet. Plaintiffs claimed that AOL, although aware that it could not process the volume, distributed a "flurry" of false and misleading advertising to promote its new flat-free program. We affirm the district court's holding that, assuming that the predicate acts were sufficiently pleaded, this claim failed to establish a RICO pattern.

Demonstrating a pattern "requires the showing of a relationship between the predicates and of the threat of continuing activity." *H.J., 492 U.S. at 239* (internal citation and quotation marks omitted). The district court properly concluded that there was no threat of continuing activity.

To satisfy the continuity requirement, Plaintiffs must prove either "a series of related predicates extending over a substantial period of time[, i.e., closed-ended continuity]," *H.J., 492 U.S. at 242,* or "past conduct that by its nature projects into the future with a threat of repetition[, i.e., open-ended continuity]," *id. at 241.* Plaintiffs argue that they met this test by alleging that AOL began its false advertising in October 1996 and continues to do so as part of its regular way of conducting business.

"Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the closed-ended continuity] requirement." *Id. at 242.* Activity that lasts only a few months is not sufficiently continuous. *See Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1528 (9th Cir. 1995)* (holding also that there is no strict one-year rule); *Wollersheim, 971 F.2d at 366-67.*

The complaint stated that AOL's "improper activities continue even at the present, in the form of misleading advertisements for 'unlimited' access." This claim was not supported by any facts. Plaintiffs provided some specifics for advertisements made before February 1997, but gave no factual support for acts after that date. Because conclusory allegations are insufficient to preclude dismissal, *see Associated Gen. Contractors of Am. v. Metropolitan Water Dist., 159 F.3d 1178, 1181 (9th Cir. 1998),* we hold that Plaintiffs failed to demonstrate closed-ended continuity.

"Open-ended continuity is shown by 'past conduct that by its nature projects into the future with a threat of repetition,' i.e., predicate acts that specifically

threaten repetition or that become a 'regular way of doing business.'" *Allwaste, 65 F.3d at 1528* (quoting *H.J., 492 U.S. at 241, 242)*. The district court held that Plaintiffs failed to state facts that reasonably imply that AOL would continue its false advertising past February 1997.

Plaintiffs tell us that AOL's regular way of doing business was to mislead the public. The complaint stated that AOL "engaged in repeated fraudulent schemes as an ongoing course of business." This general statement refers to *all* allegations of improper activity in the complaint, not just the false advertising. There is evidence that AOL's ability to process the volume was improving and, pursuant to a consent decree with the Federal Communications Commission ("FCC"), that AOL would better explain its program. Plaintiffs present no facts indicating that misleading advertising would continue into the future, particularly given that the problems stemmed from a one-time change in pricing policy. *See, e.g., Durning v. Citibank, Int'l, 990 F.2d 1133, 1139 (9th Cir. 1993)* (holding that predicate acts arising from a single event - the dissemination of a misleading document - did not satisfy the open-ended continuity requirement). The complaint does not sufficiently allege that AOL engaged in an open-ended pattern of racketeering activity.

We affirm the district court's holding that Plaintiffs' false advertising claims failed to establish a RICO pattern.

E

Plaintiffs challenge the district court's holding that the complaint did not satisfy Federal Rule of Civil Procedure 9(b) because the claims did not show each defendants' connection to the fraudulent flat-fee advertisements. *See 18 U.S.C. § § 1341* (wire fraud), 1343 (mail fraud). Because the district court properly held that these claims did not establish a RICO pattern, we decline to address this issue.

F

Plaintiffs contend that the district court erroneously dismissed their claim that AOL engaged in a conspiracy in violation of section 1962(d). *See 18 U.S.C. § 1962*(d) ("It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."). The district court concluded that Plaintiffs failed to state that the defendants were part of a RICO enterprise, agreed to violate the substantive provisions of RICO or agreed to participate in a RICO conspiracy. In particular, the district court held that the failure to adequately plead a substantive violation of RICO precludes a claim for conspiracy. We agree.

"A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor." *Salinas v. United States, 522 U.S. 52, 65, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997).* A defendant must also have been "aware of the

essential nature and scope of the enterprise and intended to participate in it." *Baumer v. Pachl, 8 F.3d 1341, 1346 (9th Cir. 1993)* (internal quotation marks omitted). To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses. *See id.*

Plaintiffs argue that the district court erroneously relied on our holding in *Wollersheim*. *See 971 F.2d at 367 n.8* ("Because we find that [the plaintiff] has failed to allege the requisite substantive elements of RICO, the conspiracy cause of action cannot stand."). If a substantive violation is properly pleaded, a conspiracy claim may survive a factfinder's conclusion that there is not sufficient evidence to prove the violation. *See Neibel v. Trans World Assurance Co., 108 F.3d 1123, 1127 (9th Cir. 1997)* (analyzing *Wollersheim*). "If the section 1962(c) claim does not state an action upon which relief could *ever* be granted, regardless of the evidence, then the section 1962(d) claim cannot be entertained." *Id.* (emphasis in original) (citing *Wollersheim, 971 F.2d at 367 n.8).*

The district court granted AOL's Rule 12(b)(6) motion and held that Plaintiffs failed to state a claim upon which relief can be granted. Plaintiffs cannot claim that a conspiracy to violate RICO existed if they do not adequately plead a substantive violation of RICO. *See id.* Even if Plaintiffs properly claimed that the defendants agreed to be a part of an enterprise, the failure to allege substantive violations precludes their claim that there was a conspiracy to violate RICO.

We affirm the district court's dismissal of Plaintiffs' conspiracy claim.

## III

Plaintiffs claimed that AOL violated the Communications Act, *47 U.S.C. § § 201,* 202(b), 551, by making unreasonable charges, practices, classifications or regulations; by unreasonably prejudicing some subscribers by favoring others; and by failing to protect subscriber privacy. The district court properly held that AOL is not a common carrier and, therefore, did not violate the Communications Act. *See, e.g., 47 U.S.C. § § 201,* 202(b) (regulating only common carriers).

"The term 'common carrier' . . . means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign transmission of energy . . . ." *47 U.S.C. § 153*(10) (Supp. III 1997). "Due to the circularity of the definition, resort must be had to court and agency pronouncements to ascertain the term's meaning." *FCC v. Midwest Video Corp., 440 U.S. 689, 701 n.10, 59 L. Ed. 2d 692, 99 S. Ct. 1435 (1979).*

The Supreme Court has defined a common carrier as one that "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *Id. at 701* (alteration in original) (quoting *In re Industrial Radiolocation Serv., 5 F.C.C.2d 197, 202 (1966)* (report and order)). "A common carrier does not 'make individualized decisions, in particular

cases, whether and on what terms to deal.'" *Id.* (quoting *National Ass'n of Regulatory Utility Comm'rs v. FCC, 173 U.S. App. D.C. 413, 525 F.2d 630, 641 (D.C. Cir. 1976)* ("*NARUC I*") (describing the "quasi-public" nature of common carriers)).

Congress created the FCC to enforce the Communications Act. *See 47 U.S.C. § 151* (Supp. III 1997). The Supreme Court's "opinions have repeatedly emphasized that the [FCC's] judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild, 450 U.S. 582, 596, 67 L. Ed. 2d 521, 101 S. Ct. 1266 (1981).*

Federal regulations describe a common carrier as "any person engaged in rendering communication service for hire to the public." 47 C.F.R. § 21.2. The FCC has declared that, under the Communications Act, "'carriers' is synonymous with the term 'common carriers,' which does not include ISPs." *In re Non-Accounting Safeguards, 11 FCC Rcd 21905, 22034 (1996)* (proposed rule) (citing *47 U.S.C. § 153*(10)). This opinion stems from the FCC's distinction between "basic" and "enhanced" services.

The FCC has concluded that common carriers offer "basic" information transport rather than "enhanced" services, which implicate the transfer and storage of information that subscribers can access. *See In re Second Computer Inquiry, 77 F.C.C.2d 384, 417-23 (1980)* (final decision); 47 C.F.R. 64.702(a) ("*Enhanced service* shall refer to services . . . which employ computer processing applications that act on the

format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act."). Enhanced services "include[ ] access to the Internet and other interactive computer networks." *In re Access Charge Reform, 12 FCC Rcd 15982, 16131 n.498 (1997)* (proposed rule). The FCC has consistently stated that ISPs are not common carriers. *See In re Federal-State Joint Board on Universal Service, 12 FCC Rcd 87, 479 (1996)* (recommended decision) ("[Enhanced Service Providers ("ESPs")] note that the Commission has traditionally defined on-line and Internet services as enhanced services and has not regulated [ESPs] as common carriers . . . .").

The FCC's construction of "common carrier" is a reasonable interpretation of an ambiguous statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The Telecommunications Act of 1996, which amended the Communications Act, further supports the FCC. Congress provided, in a section prohibiting obscene or harassing communications, that "nothing in this section shall be construed to treat interactive computer services as common carriers." 47 U.S.C. § 223(e)(6) (Supp. III 1997). "The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." Sorenson v. Secretary of Treasury, 475 U.S. 851, 860, 89 L. Ed. 2d 855, 106 S. Ct. 1600 (1986) (internal quotation marks omitted). Congress also stated that its aim is "to preserve the

vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2) (West Supp. 1999). The FCC's interpretation meets this policy goal.

Plaintiffs argue that AOL should be regulated in part as a common carrier. The D.C. Circuit stated that "since it is clearly possible for a given entity to carry on many types of activities, it is at least logical to conclude that one can be a common carrier with regard to some activities but not others." *National Ass'n of Regulatory Utility Comm'rs v. FCC, 174 U.S. App. D.C. 374, 533 F.2d 601, 608 (D.C. Cir. 1976)* ("*NARUC II*"); *see also McDonnell Douglas Corp. v. General Tel. Co., 594 F.2d 720, 725 n.3 (9th Cir. 1979)* (citing *NARUC II*). The facts here are distinguishable.

*NARUC II* involved the objection of cable operators, which previously had not been classified as common carriers, to the FCC's assertion of preemption over leased access two-way channels. *See 533 F.2d at 605*. These channels used a different bandwidth than the normal one-way channels and constituted a distinct mode of cable service. *See id.* at 605-06. Conversely, e-mail and "chat rooms," which Plaintiffs cite as common carrier activity, are integral to AOL's services.

"The service that the Internet access providers offer to members of the public is Internet access . . . ." *In re Federal-State Joint Board on Universal Service, 13 FCC Rcd 11501, 11539 (1998)* (report to Congress) (contrasting services of application providers such as Juno, which offered only e-mail). The FCC has stated

that hybrid services like those offered by AOL "are information[, i.e., enhanced] services, and are not telecommunication services." *Id. at 11529.* This conclusion is reasonable because e-mail fits the definition of an enhanced service - the message is stored by AOL and is accessed by subscribers; AOL does not act as a mere conduit for information. *See id. at 11539.* Even chat rooms, where subscribers can exchange messages in "real-time," are under AOL's control and may be reformatted or edited. *See id. at 11537-38.* Plaintiffs have failed to show that AOL offers discrete basic services that should be regulated differently than its enhanced services. *Accord America Online, Inc. v. GreatDeals.Net, 49 F. Supp. 2d 851, 855-57 (E.D. Va. 1999)* (holding that AOL is not a common carrier); *CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015, 1025 (S.D. Ohio 1997)* ("[ISPs] have been held not to be common carriers.") (citing *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1369 n.12 (N.D. Cal. 1995)* (holding, in copyright suit, that ISP was not a common carrier)).

We hold that AOL is not a common carrier under the Communications Act.

## IV

Plaintiffs sought a declaration that AOL violated Plaintiffs' constitutional rights and improperly asserted ownership of Plaintiffs' copyrights. The district court dismissed these counts in part because Plaintiffs failed to state claims for relief under federal law, thereby depriving the court of jurisdiction. We agree.

A request for declaratory judgment does not provide an independent basis for federal jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 672, 94 L. Ed. 1194, 70 S. Ct. 876 (1950).* The district court concluded that Plaintiffs' constitutional claims lacked the necessary state action and that their copyright allegations failed to state a claim under federal copyright law.

Plaintiffs argue that their claims under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments do not require state action. *Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965),* which Plaintiffs cite in support of their argument, expressly noted that the Fourth and Fifth Amendments protect "against all *governmental* invasions." *Id. at 484* (emphasis added). The "general right to privacy, . . . Fourteenth Amendment liberty[,] and the other elements of those more general rights are obviously *not* protected against private infringement." *Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 278, 122 L. Ed. 2d 34, 113 S. Ct. 753 (1993)* (emphasis in original) (internal citations omitted) (holding that only rights under the Thirteenth Amendment protect against private action); *see also United States v. Young, 153 F.3d 1079, 1080 (9th Cir. 1998)* ("The Fourth Amendment limits searches conducted by the government, not by a private party, unless the private party acts as an 'instrument or agent' of the government."); *Rank v. Nimmo, 677 F.2d 692, 701 (9th Cir. 1982)* ("The Due Process Clause of the Fifth Amendment applies to actions of the federal government and not to individual activities of private actors[, unless] . . . the action of the latter may be fairly

treated as that of the [government] itself.") (internal quotation marks omitted).

Plaintiffs counter that AOL is a "quasi-public utility" that "involves a public trust." This claim is insufficient to hold that AOL is an "instrument or agent" of the government. There is nothing in the record that supports the contention that AOL should be considered a state actor. *Accord Thomas v. Network Solutions, Inc., 176 F.3d 500, 511 (D.C. Cir. 1999)* (holding that company in charge of Internet domain names is a private actor); *Cyber Promotions, Inc. v. American Online, Inc., 948 F. Supp. 436, 443-44 (E.D. Pa. 1996)* (holding that AOL is not a state actor). We conclude that Plaintiffs did not sufficiently plead constitutional claims against AOL; thus, these claims cannot support federal jurisdiction over the request for declaratory and injunctive relief.

Plaintiffs asserted that federal jurisdiction was based also on violations of federal copyright law. Federal jurisdiction under the Copyright Act, *17 U.S.C. § § 101-810*, exists:

> if and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction . . . or asserts a claim requiring construction of the Act, . . . or, at the very least and perhaps more doubtfully, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.

*Topolos v. Caldewey, 698 F.2d 991, 993 (9th Cir. 1983)* (alterations in original) (quoting *T.B. Harms Co. v. Eliscu, 339 F.2d 823, 828 (2d Cir. 1964)).*

The district court held that Plaintiffs alleged that AOL improperly transferred copyright ownership, which was insufficient to support federal jurisdiction. This conclusion gives the complaint too much credit. Although Plaintiffs stated that AOL transferred ownership in violation of *17 U.S.C. § 204,* and continued to "improperly take[ ]" copyrighted material, the complaint makes clear that ownership is not at issue. Rather, Plaintiffs claimed that AOL asserted a *license* "without proper notice, adequate compensation and bilateral negotiation." Indeed, Plaintiffs quote the AOL agreement, which expressly refers to a "license to use" the material.

Plaintiffs argue that ITSI T.V. Prods., Inc. v. California Auth. of Racing Fairs, 785 F. Supp. 854, 862 (E.D. Cal. 1992), rev'd in part sub nom. ITSI T.V. Prods., Inc. v. Agricultural Ass'ns, 3 F.3d 1289 (9th Cir. 1993), supports the proposition that there is federal jurisdiction over AOL's vicarious liability for the infringement of copyrights. ITSI is inapposite; Plaintiffs did not cite any acts of infringement, either with or without AOL's involvement.

Plaintiffs claimed merely that AOL enacted an improper license agreement. The ownership of copyrights is not at issue, and Plaintiffs have not claimed any infringement, or requested relief, under the Copyright Act. The copyright claims do not support

federal jurisdiction. *See Topolos, 698 F.2d at 993-94; Dolch v. United Cal. Bank, 702 F.2d 178, 180-81 (9th Cir. 1983).*

We hold that Plaintiffs' constitutional and copyright claims are insufficient bases for federal jurisdiction.

## V

Plaintiffs do not challenge the district court's holding that, given the lack of jurisdiction over the federal claims, dismissal of the state law claims was proper. "When federal claims are dismissed before trial . . . pendent state claims also should be dismissed." *Wollersheim, 971 F.2d at 367-68* (alteration in original) (quoting *Jones v. Community Redevelopment Agency, 733 F.2d 646, 651 (9th Cir. 1984)).*

We affirm the dismissal of the state law claims.

AFFIRMED.

# APPENDIX B – SELECTED PORTIONS OF FEDERAL COMMUNICATIONS ACT OF 1934, 47 U.S.C. § 151 et seq.

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION
## GENERAL PROVISIONS

### 47 USCS § 151 (1998)

§ 151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act [47 USCS §§ 151 et seq.].

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION
## GENERAL PROVISIONS

47 USCS § 152 (1998)

§ 152. Application of chapter

(a) The provisions of this Act [47 USCS §§ 151 et seq.] shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone. The provisions of this Act [47 USCS §§ 151 et seq.] shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in title VI [47 USCS §§ 521 et seq.].

(b) Except as provided in sections 223 through 227 [47 USCS §§ 223-227], inclusive, and section 332 [47 USCS § 332], and subject to the provisions of section 301 [47 USCS § 301] and Title VI [47 USCS §§ 521 et seq.], nothing in this Act [47 USCS §§ 151 et seq.] shall be

construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 through 205 of this Act, both inclusive [47 USCS §§ 201-205], shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4).

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION GENERAL PROVISIONS

47 USCS § 153 (1998)

§ 153. Definitions

For the purposes of this Act [47 USCS §§ 151 et seq.], unless the context otherwise requires—

(1) Affiliate. The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

. . .

(5) Broadcast station. The term "broadcast station", "broadcasting station", or "radio broadcast station" means a radio station equipped to engage in broadcasting as herein defined.

(6) Broadcasting. The term "broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

(7) Cable service. The term "cable service" has the meaning given such term in section 602.

(8) Cable system. The term "cable system" has the meaning given such term in section 602.

(9) Chain broadcasting. The term "chain broadcasting" means simultaneous broadcasting of an identical program by two or more connected stations.

(10) Common carrier. The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act [47 USCS §§ 151 et seq.]; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

(11) Connecting carrier. The term "connecting carrier" means a carrier described in clauses (2), (3), or (4) of section 2(b) [47 USCS § 152(b)].

. . .

(13) Corporation. The term "corporation" includes any corporation, joint-stock company, or association.

(14) Customer premises equipment. The term "customer premises equipment" means equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications.

(15) Dialing parity. The term "dialing parity" means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among 2 or more telecommunications services providers (including such local exchange carrier).

(16) Exchange access. The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.

(17) Foreign communication. The term "foreign communication" or "foreign transmission" means communication or transmission from or to any place in the United States to or from a foreign country, or between a station in the United States and a mobile station located outside the United States.

. . .

(20) Information service. The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(21) InterLATA service. The term "interLATA service" means telecommunications between a point located in a local access and transport area and a point located outside such area.

(22) Interstate communication. The term "interstate communication" or "interstate transmission" means communication or transmission (A) from any State, Territory, or possession of the United States (other than the [Philippine Islands and] the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than [the Philippine Islands and] the Canal Zone), or the District of Columbia, (B) from or to the United States to or from [the Philippine Islands or] the Canal Zone, insofar as such communication or transmission takes place within the United States, or (C) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act [47 USCS §§ 201 et seq.] (other than section 223 thereof [47 USCS § 223]) include wire or rādio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

. . .

(25) Local access and transport area. The term "local access and transport area" or "LATA" means a contiguous geographic area—

(A) established before the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996] by a Bell operating company such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or

(B) established or modified by a Bell operating company after such date of enactment and approved by the Commission.

(26) Local exchange carrier. The term "local exchange carrier" means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c) [47 USCS § 332(c)], except to the extent that the Commission finds that such service should be included in the definition of such term.

(27) Mobile service. The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any

service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

. . .

(29) Network element. The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

. . .

(32) Person. The term "person" includes an individual, partnership, association, joint-stock company, trust, or corporation.

(33) Radio communication. The term "radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

. . .

(35) Radio station. The term "radio station" or "station" means a station equipped to engage in radio communication or radio transmission of energy.

. . .

(40) State. The term "State" includes the District of Columbia and the Territories and possessions.

(41) State commission. The term "State commission" means the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.

. . .

(43) Telecommunications. The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier. The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 [47 USCS § 226]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether

the provision of fixed and mobile satellite service shall be treated as common carriage.

(45) Telecommunications equipment. The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

(46) Telecommunications service. The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(47) Telephone exchange service. The term "telephone exchange service" means (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.

(48) Telephone toll service. The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

(49) Television service.

(A) Analog television service. The term "analog television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(a) of its regulations (47 C.F.R. 73.682(a)).

(B) Digital television service. The term "digital television service" means television service provided pursuant to the transmission standards prescribed by the Commission in section 73.682(d) of its regulations (47 C.F.R. 73.682(d)).

(50) Transmission of energy by radio. The term "transmission of energy by radio" or "radio transmission of energy" includes both such transmission and all instrumentalities, facilities, and services incidental to such transmission.

(51) United States. The term "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include [the Philippine Islands or] the Canal Zone.

(52) Wire communication. The term "wire communication or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things,

the receipt, forwarding, and delivery of communications) incidental to such transmission.

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION
## COMMON CARRIERS
## COMMON CARRIER REGULATION

47 USCS § 201 (1998)

§ 201. Service and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: Provided, That communications by wire or radio subject to this Act [47 USCS §§ 151 et seq.] may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different

charges may be made for the different classes of communications: Provided further, That nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall be construed to prevent a common carrier subject to this Act [47 USCS §§ 151 et seq.] from entering into or operating under any contract with any common carrier not subject to this Act [47 USCS §§ 151 et seq.], for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: Provided further, That nothing in this Act [47 USCS §§ 151 et seq.] or in any other provision of law shall prevent a common carrier subject to this Act [47 USCS §§ 151 et seq.] from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act [47 USCS §§ 151 et seq.].

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
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47 USCS § 202 (1998)

§ 202. Discriminations and preferences

(a) Charges, services, etc. It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included. Charges or services, whenever referred to in this Act [47 USCS §§ 151 et seq.], include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Penalty. Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $ 6,000 for each such offense and $ 300

for each and every day of the continuance of such offense.

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION
## COMMON CARRIERS
## COMMON CARRIER REGULATION

### 47 USCS § 203 (1998)

§ 203. Schedules of charges

(a) Filing; public display. Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this Act [47 USCS §§ 151 et seq.] when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements.

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this Act [47 USCS §§ 151 et seq.], shall engage, or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act [47 USCS §§ 151 et seq.] and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or

facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal. The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations. In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $ 6,000 for each such offense, and $ 300 for each and every day of the continuance of such offense.

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION
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## COMMON CARRIER REGULATION

47 USCS § 206 (1998)

§ 206. Carriers' liability for damages

In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this Act [47 USCS §§ 151 et seq.] prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act [47 USCS §§ 151 et seq.] required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act [47 USCS §§ 151 et seq.], together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

# TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
## CHAPTER 5. WIRE OR RADIO COMMUNICATION
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## COMMON CARRIER REGULATION

47 USCS § 207 (1998)

§ 207. Recovery of damages

Any person claiming to be damaged by any common carrier subject to the provisions of this Act [47 USCS §§ 151 et seq.] may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this Act [47 USCS §§ 151 et seq.], in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

# APPENDIX C - SELECTED PORTIONS OF COPYRIGHT LAWS OF THE UNITED STATES, 17 U.S.C. § 101 et seq.

# TITLE 17. COPYRIGHTS
## CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

### 17 USCS § 101 (1998)

§ 101. Definitions

Except as otherwise provided in this title, as used in this title, the following terms and their variant forms mean the following:

An "anonymous work" is a work on the copies or phonorecords of which no natural person is identified as author.

An "architectural work" is the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

The "Berne Convention" is the Convention for the Protection of Literary and Artistic Works, signed at

Berne, Switzerland, on September 9, 1886, and all acts, protocols, and revisions thereto.

The "best edition" of a work is the edition, published in the United States at any time before the date of deposit, that the Library of Congress determines to be most suitable for its purposes.

A person's "children" are that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

A "computer program" is a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.

"Copyright owner", with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.

For purposes of section 411, a work is a "United States work" only if—

1) in the case of a published work, the work is first published--

(A) in the United States;

(B) simultaneously in the United States and another treaty party or parties, whose law grants a term of copyright protection that is the same as or longer than the term provided in the United States;

(C) simultaneously in the United States and a foreign nation that is not a treaty party; or

(D) in a foreign nation that is not a treaty party, and all of the authors of the work are nationals, domiciliaries, or habitual residents of, or in the case of an audiovisual work legal entities with headquarters in, the United States;

(2) in the case of an unpublished work, all the authors of the work are nationals, domiciliaries, or habitual residents of the United States, or, in the case of an unpublished audiovisual work, all the authors are legal entities with headquarters in, the United States; or

(3) in the case of a pictorial, graphic, or sculptural work incorporated in a building or structure, the building or structure is located in the United States.

A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work".

A "device", "machine", or "process" is one now known or later developed.

A "digital transmission" is a transmission in whole or in part in a digital or other non-analog format.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

An "establishment" is a store, shop, or any similar place of business open to the general public for the primary purpose of selling goods or services in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

A "food service or drinking establishment" is a restaurant, inn, bar, tavern, or any other similar place of business in which the public or patrons assemble for the primary purpose of being served food or drink, in which the majority of the gross square feet of space that is nonresidential is used for that purpose, and in which nondramatic musical works are performed publicly.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

The "Geneva Phonograms Convention" is the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, concluded at Geneva, Switzerland, on October 29, 1971.

The "gross square feet of space" of an establishment means the entire interior space of that establishment,

and any adjoining outdoor space used to serve patrons, whether on a seasonal basis or otherwise.

The terms "including" and "such as" are illustrative and not limitative.

An "international agreement" is—

(1) the Universal Copyright Convention;

(2) the Geneva Phonograms Convention;

(3) the Berne Convention;

(4) the WTO Agreement;

(5) [Caution: This paragraph takes effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States, as provided by § 105(b)(1) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] the WIPO Copyright Treaty;

(6) [Caution: This paragraph takes effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States, as provided by § 105(b)(2) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] the WIPO Performances and Phonograms Treaty; and

(7) any other copyright treaty to which the United States is a party.

A "joint work" is a work prepared by two or more authors with the intention that their contributions be

merged into inseparable or interdependent parts of a unitary whole.

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

To "perform" a work means to recite, render, play, dance, or act it, either directly or by means of any device or process or, in the case of a motion picture or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

A "performing rights society" is an association, corporation, or other entity that licenses the public performance of nondramatic musical works on behalf of copyright owners of such works, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC, Inc.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds

can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

"Pictorial, graphic, and sculptural works" include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

A "proprietor" is an individual, corporation, partnership, or other entity, as the case may be, that owns an establishment or a food service or drinking establishment, except that no owner or operator of a radio or television station licensed by the Federal Communications Commission, cable system or satellite carrier, cable or satellite carrier service or programmer, provider of online services or network access or the operator of facilities therefor, telecommunications company, or any other such audio or audiovisual service or programmer now known or as may be developed in the future, commercial subscription music service, or owner or operator of any other transmission

service, shall under any circumstances be deemed to be a proprietor.

The term "financial gain" includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.

A "pseudonymous work" is a work on the copies or phonorecords of which the author is identified under a fictitious name.

"Publication" is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"Registration", for purposes of sections 205(c)(2), 405, 406, 410(d), 411, 412, and 506(e), means a registration of a claim in the original or the renewed and extended term of copyright.

"Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.

"State" includes the District of Columbia and the Commonwealth of Puerto Rico, and any territories to which this title is made applicable by an Act of Congress.

A "transfer of copyright ownership" is an assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

A "treaty party" is a country or intergovernmental organization other than the United States that is a party to an international agreement.

The "United States", when used in a geographical sense, comprises the several States, the District of Columbia and the Commonwealth of Puerto Rico, and the organized territories under the jurisdiction of the United States Government.

A "useful article" is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a "useful article".

The author's "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death, whether or not the spouse has later remarried.

[Caution: This subdivision takes effect upon the entry into force of the WIPO Copyright Treaty with respect to the United States, as provided by § 105(b)(1) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] The "WIPO Copyright Treaty" is the WIPO Copyright Treaty concluded at Geneva, Switzerland, on December 20, 1996.

[Caution: This paragraph takes effect upon the entry into force of the WIPO Performances and Phonograms Treaty with respect to the United States, as provided by § 105(b)(2) of Act Oct. 28, 1998, P.L. 105-304, which appears as a note to this section.] The "WIPO

Performances and Phonograms Treaty" is the WIPO Performances and Phonograms Treaty concluded at Geneva, Switzerland, on December 20, 1996.

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

A work of visual art does not include—

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

The terms "WTO Agreement" and "WTO member country" have the meanings given those terms in paragraphs (9) and (10), respectively, of section 2 of the Uruguay Round Agreements Act [19 USCS § 3501].

# TITLE 17. COPYRIGHTS
# CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

## 17 USCS § 102 (1998)

§ 102. Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

# TITLE 17. COPYRIGHTS
## CHAPTER 1. SUBJECT MATTER AND SCOPE OF COPYRIGHT

### 17 USCS § 106 (1998)

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 120, the owner of a copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

# TITLE 17. COPYRIGHTS
# CHAPTER 2. COPYRIGHT OWNERSHIP AND TRANSFER

## 17 USCS § 201 (1998)

§ 201. Ownership of copyright

(a) Initial ownership. Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) Works made for hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) Contributions to collective works. Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) Transfer of ownership.

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) Involuntary transfer. When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

Supreme Court, U.S.
FILED
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CLERK

No. 99-2089 (2)

IN THE

**SUPREME COURT OF THE UNITED STATES**

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ALAN M. HOWARD, R. BORIS GREENBERG, KATHRYN PARAVENTI, and MERHDAD ETEMAD, on behalf of themselves, and on behalf of all others similarly situated,

*Petitioners,*

vs.

AMERICA ONLINE, INC., JAMES V. KIMSEY, STEPHEN M. CASE, and LENNERT J. LEADER,

*Respondents.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

# SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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# APPENDIX D –ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE FILED MAY 14, 1998, AND ENTERED MAY 19, 1998

**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

CV 97-1642-AAH

ALAN M. HOWARD, et al.,

Plaintiffs,

v.

AMERICA ONLINE, INC., et al.,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT WITH PREJUDICE**

## I. INTRODUCTION

Plaintiffs filed their original Complaint on March 13, 1997. On September 22, 1997, following full briefing and hearing, the Court granted Defendants' motion to dismiss the Complaint, with leave to amend. Plaintiffs filed their First Amended Complaint on October 23, 1997. On January 26, again following full briefing and hearing, the Court granted Defendants' motion to dismiss the First Amended Complaint without leave to amend. At that time, the Court partially explained the basis for its decision. The Court now sets forth in full its findings of fact and conclusions of law.

## II. BACKGROUND

Plaintiffs are four subscribers to AOL who have used its services in both their personal and professional capacities. Plaintiffs purport to bring this lawsuit on behalf of millions of subscribers of AOL injured by the Defendants' actions.

Defendant America On-Line provides interactive computer services to its subscribers, including access to the Internet and the World Wide Web, email, online conferencing, online information directories, entertainment, software, and extensive "newsstand" of electronic magazines and newspapers, and a broad array of original programming and content.

Defendant James V. Kimsey is a co-founder, Chairman Emeritus, and a member of the Board of Directors of AOL. Defendant Stephen M. Case is a

co-founder, President, Chief Executive Officer, Director and Chairman of the Board of AOL. Defendant Lennert J. Leader is Senior Vice President, Chief Financial Officer, and a member of the Board of Directors of AOL. Plaintiffs assert that Defendants Kimsey, Case and Leader were at all relevant times the persons responsible for the management and control of defendant AOL, and for implementing and conducting the pattern of activity complained of.

Plaintiffs' First Amended Complaint challenges four categories of alleged fraudulent conduct. fraudulent billing practices and other fraudulent treatment of AOL's customers; securities fraud; fraudulent dealings with AOL's packaging supplier; and the fraudulent introduction of AOL's flat-fee pricing program. Plaintiffs also allege that AOL is a "common carrier" as defined in the Federal Communications Act. Finally, Plaintiffs set forth an array of purported privacy and intellectual property concerns.

The First Amended Complaint, filed October 22, 1997, states the following nine causes of action:

1. Violation of § 1962(c) of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (RICO) by the individual Defendants; and Conspiracy to violate RICO by the individual defendants, in violation of U.S.C. § 1962(d)

2. Violation of § 1962(c) of RICO by all Defendants; and Conspiracy to violate RICO by all Defendants, in violation of U. S.C. § 1962(d)

3. Violation of the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, against Defendant AOL

4. False Advertising in violation of Cal. Bus. & Prof. Code §§ 17500 *et seq.*, against all Defendants

5. Fraud and Deceit, against all Defendants

6. Negligence, against all Defendants

7. Unfair Business Practices in violation of Cal. Bus. & Prof. Code §§ 17200 *et seq.*, against all Defendants

8. Declaratory and Injunctive Relief, against all Defendants

9. Declaratory and Injunctive Relief, against all Defendants

## III. DISCUSSION

All Defendants have brought a motion to dismiss under Fed.R.Civ.P. 12(b)(6). A complaint should only be dismissed for failure to state a cause of action when "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S Ct. 99, 101-02, 2 L.Ed.2d 80 (1957). All

allegations in the complaint should be construed in favor of the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S Ct. 1683, 1686, 40 L.Ed.2d 90.

In other words, a motion to dismiss should be granted only when there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). Because Plaintiffs fail to allege sufficient facts to establish liability under any of their federal claims, the Amended Complaint must be dismissed.

**A. Plaintiffs' First and Second Causes of Action Fail to State a Claim Under Any Section of RICO**

Plaintiffs' first cause of action charges three of AOL's officers with conducting AOL's affairs through a pattern of racketeering activity, in violation of § 1962(c) of the Racketeering Influenced and Corrupt Organizations Act, Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968. The second cause of action alleges violation of RICO by the corporation as well as the individual officers. Both causes of action also state conspiracy claims under § 1962(d) of RICO against the respective defendants named in the two counts.

Plaintiffs' First Amended Complaint alleges that the Defendants violated RICO by engaging in four categories of allegedly fraudulent conduct: (1) manipulating AOL's billing practices and charging subscribers excessive fees; (2) artificially inflating the

value of the company's stock so that AOL's officers could sell it at overvalued prices; (3) engaging in fraudulent dealings with AOL's packaging supplier, PTP Industries, Inc.; and (4) fraudulently advertising AOL's flat-fee pricing plan in order to increase subscribership beyond the company's ability to provide Internet access to its subscribers;

The RICO statute provides, at 18 U.S.C. § 1962(c):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Liability under § 1962(c) is therefore established by showing the following four factors: (1) the conduct, (2) of an enterprise, (3) through a pattern, (4) of racketeering activity. *Sedima, S.P.RL. v. Imrex Co.*, 473 U.S. 479, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985).

Defendants argue that Plaintiffs' RICO claims are fatally deficient for four reasons: (1) plaintiff's second claim fails to allege a proper RICO "enterprise;" (2) Plaintiffs' allegations fail to establish a "pattern" of racketeering activity; and (3) Plaintiffs fail to allege predicate acts of racketeering with the specificity required by Rule 9(b) of the Federal Rules of Civil

Procedure; (4) Plaintiffs fail to properly allege a conspiracy under RICO.

Because the Court finds that Plaintiffs' RICO claims are in fact deficient for the second, third and fourth reasons set forth by Defendants, Plaintiffs' first and second causes of action must be dismissed.

**1. Plaintiffs' allegations meet RICO's "enterprise" requirement.**

To assert a claim under RICO, a plaintiff must allege that the defendant has directly or indirectly conducted or participated in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity. 18 U.S.C. § 1962(c). The statute defines an enterprise as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Plaintiffs' first cause of action alleges violation of RICO against the individual defendants. The second cause of action alleges a RICO claim against all individual defendants and against AOL as a corporation. Plaintiffs allege that the individual defendants, and AOL by the acts of the defendants as corporate officers, exercised control of an enterprise, AOL itself, through a pattern of racketeering activity.

Defendants do not challenge the "enterprise" element in Plaintiffs' first cause of action, but assert that the only "enterprise" described in Plaintiffs' second cause of action, brought against the corporation, is an

ever-changing mix of computer designers, operators and subscribers associated with AOL. A RICO enterprise must exhibit "some sort of structure . . . for the making of decisions ...." *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996) (citations omitted).

However, sufficient structure exists if the associational ties of those charged with a RICO violation amount to an organizational pattern or system of authority. *United States v. Feldman*, 853 F.2d 648 (9th Cir. 1988). Plaintiffs allege that AOL had such a leadership structure, led by the three corporate defendants who were able to make corporate decisions. The "enterprise" element of RICO liability is therefore met.

**2. Plaintiffs fail to establish a pattern of racketeering activity under RICO.**

The RICO statute imposes civil and criminal liability on a defendant who has engaged in a "pattern" of "racketeering activity." 18 U.S.C. § 1962(c). The definitions of both terms are essential to the Court's attempt to determine whether Plaintiffs have set forth allegations showing a RICO violation.

"Racketeering activity" is defined in § 1962(1) as any "predicate act" indictable under several provisions of Title 18 of the United States Code, including mail fraud, 18 U. S.C. § 1341, and wire fraud, 18 U.S.C. § 1343.

The statute does not specifically define the term "pattern," except to state that a pattern "requires at

least two acts of racketeering" within a ten year period. 18 U.S.C. § 1961(5). The Supreme Court has determined, however, that this "two-act" requirement states only the bare numerical minimum, rejecting the suggestion that a pattern is established "merely by proving two predicate acts." *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 236-37, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Relying on the legislative history of RICO,[1] the Court reasoned that "there is something to a RICO pattern beyond simply the number of predicate acts involved." *Id.* at 238.

A RICO pattern is shown only when a plaintiff demonstrates that (1) the predicate acts are related, and (2) that the acts "amount to, or threaten the likelihood of, continued criminal activity." *Id.* at 239.

As the Court noted, "the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a 'pattern of racketeering activity' exists." *Id.* at 243. Instead, the Court reasoned that Congress "had a fairly flexible concept of pattern in mind." *Id.* at 239.

The first requirement of a RICO pattern, "relatedness," is met when the allegedly criminal conduct "embraces criminal acts that have the same or similar purposes, results, participants, victims, or

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[1] The principal sponsor of the Senate bill indicated that "proof of two acts of racketeering, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan). See *H.J, Inc.*, 492 U.S. at 238.

methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* at 240 (applying the statutory definition of "pattern" from Title X of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, of which RICO formed Title IX).

The second requirement, that the plaintiff show that there is "continuity" in the defendant's acts, is more difficult to apply. The Supreme Court explained that "continuity is both a closed-ended and open-ended concept, referring either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

Establishing continuity over a "closed" period requires that the defendant engage in "a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement: Congress was concerned in RICO with long-term criminal conduct." *Id.* at 242 (emphasis added).

Open-ended continuity, on the other hand, is established when the predicate acts "include a specific threat of repetition extending indefinitely into the future," or when the offenses are sufficiently prevalent as to constitute an entity's "regular way of doing business." *Id.*

With these principles in mind, the court must decide whether each of the acts allegedly committed by AOL constitutes a "predicate act" under RICO. Then

the court must decide whether those acts which are properly considered predicate acts are sufficiently related; and if, when considered together, they sufficiently demonstrate either the closed or open-ended continuity necessary to establish a "pattern" of racketeering activity.

For the reasons set out below, the Court finds that such a pattern is not established. Most of the alleged misconduct is not actionable because the claims have already been settled (the fraudulent billing claims); the activity has been deleted from RICO (securities fraud); or the conduct did not injure Plaintiffs and is unrelated to the other allegations (securities fraud and fraudulent dealings with AOL's packaging supplier). The only remaining conduct (the advertising of the flat fee program) did not last long enough to form a "pattern" under RICO.

Plaintiffs essentially attempt to link every "bad act" alleged against AOL over the last several years, and argue that together they constitute a pattern of racketeering activity. If Plaintiffs' position correctly stated the law under RICO, every state law fraud claim against a major corporation would be transformed into the latest episode in a continuous "pattern" of racketeering activity. Since Plaintiffs' allegations do not meet the "relatedness" and "continuity," tests required to establish a pattern under RICO, these claims must be dismissed.

**a) Plaintiffs' use of allegations of billing fraud before the flat-fee program to establish a pattern under RICO is barred by a previous settlement.**

Plaintiffs' First Amended Complaint alleges that the Defendants engaged in a variety of fraudulent billing practices previous to the adoption of AOL's flat-fee program, including false calculation of subscribers' online time by rounding up of billing increments (First Amended Complaint, ¶¶ 56-65); improper accounting practices (¶¶ 74-80); fraudulent billing for time spent in "free" areas (¶¶ 101-105); fraudulently delaying account cancellations (¶¶ 106-110); unauthorized checking account withdrawals (¶¶ 111-114); and deceptive billing practices involving "free trial period" programs (¶¶ 115-121). Plaintiffs allege that these actions began in 1992 and continued into 1996. Plaintiffs assert that both mail and wires were used to accomplish these actions, thereby making them predicate acts of racketeering activity.

Allegations concerning these billing practices have already been litigated and settled in a previous class-action suit, *Hagen v. America Online, Inc.*, San Francisco Superior Court Case No. 971047 (See First Amended Complaint in Hagen, Exhibit 5 of Defendant's Request for Judicial Notice).[2]

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[2] When considering a motion to dismiss brought under Rule 12(b)(6), a court may take judicial notice of matters of public record such as pleadings, orders and other papers on file in

The Complaint in Hagen sought relief from AOL for inadequate disclosures regarding connection and disconnection time; rounding up of billing increments; misleading advertising of AOL's hourly rate; unfair calculation of service charges on a per-minute basis; improper charging for downloading, delays in connection time, and time spent in "free areas;" failure to refund charges upon cancellation; and unauthorized withdrawals from subscribers' checking accounts (First Amended Complaint, Exhibit 5 of Defendants' Request for Judicial Notice, p. 2-3).

The Settlement Class in Hagen included "all persons in the United States who at any time during the Class Period were Subscribers of America Online Services." (Stipulation of Settlement, Exhibit 1 of Defendants' Request for Judicial Notice, p. 8). The Class Period was defined as the period between July 14, 1991 and March 31, 1996. (Stipulation of Settlement, p. 7).

The court's Final Judgment in the Hagen case, filed March 16, 1997 enforcing the terms of the Settlement Stipulation, bars the Settlement Class

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another case. *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279 (9th Cir. 1986). The court therefore fakes judicial notice of the following documents submitted by Defendants with their Request for Judicial Notice: (1) Stipulation of Settlement in Hagen v. America Online, attached as Exhibit 1; (2) : Final Judgment and Order of Dismissal, attached as Exhibit 2; (3) Statement of Decision Approving Fairness and Adequacy of Settlement, attached as Exhibit 3; (4) Notice of Entry of Statement of Decision Approving Fairness and Adequacy of Settlement, attached as Exhibit 4; and (5) First Amended Complaint, attached as Exhibit 5.

Members[3] from relitigating the issues settled there, including all claims that were alleged in the Complaint, "or which could or might have been alleged in the Amended Complaint and arise out of or are related to the matters referred to in the Amended Complaint." (Final Judgment and Order of Dismissal, Exhibit 2 of Defendant's Request for Judicial Notice). Since the allegations of billing fraud set out in the current Plaintiffs' Amended Complaint mirror the allegations settled in *Hagen*, they come within the scope of *Hagen's* settlement and are barred.[4]

Plaintiffs attempt to defeat the preclusive effect of the *Hagen* settlement by arguing that the allegations forming the basis of the claims in *Hagen* in may be included as evidence of a larger pattern of racketeering activity for purposes of establishing liability under RICO. This argument fails, however, because a release, which is governed by the same principles as other contractual agreements, bars all claims arising out of the same incident, against all tortfeasors. *General Motors Corp. v. Superior Court*, 12 Cal.App.4th 435, 439, 15 Cal.Rptr. 622, 625 (1993). See also *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1287 (9th Cir. 1992)

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[3] Plaintiffs clearly fall within the Settlement Class, since they claim to have been AOL subscribers between 1992 and March, 1996. Plaintiffs have not presented any argument to the contrary; nor do they claim to have opted out of the *Hagen* Settlement Class.

[4] This court is required to give preclusive effect to the state court judgment in Hagen, pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738, even though the case was resolved by settlement. *Matsushita Electronic Industrial Co. v. Epstein*, — U.S. —, 116 S.Ct. 873, 874, 134 L.Ed.2d 6 (1996).

(settlement release barred "not only those claims alleged in the complaint, but also a claim 'based on the identical factual predicate as that underlying the claims in the settled class action even though the claim was not presented and might not have even presentable in the class action'"), *cert. denied* 506 U.S. 953 (1992), *quoting TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 460 (4th Cir. 1982).

This principle of preclusion is specifically applicable in the RICO context. A plaintiff is barred from using allegations underlying previously litigated claims to support a subsequent RICO claim. *Mortel v. Mortel Co.*, 887 F.2d 1322, 1325-26 (7th Cir. 1989) (holding that a shareholder who brought a state court breach of contract suit was barred by res judicata from bringing a subsequent federal RICO action, where the alleged predicate acts concerned the same transaction or series of facts).

Plaintiffs' attempt to repackage the claims asserted and settled in *Hagen* as predicate acts under RICO is therefore barred. The billing fraud allegations set out in the Complaint may not be considered as evidence of a pattern of racketeering activity.

**b) Acts of securities fraud are no longer "predicate acts" under RICO.**

Plaintiffs allege in Paragraphs 66-73 and 89-95 of the First Amended Complaint that the individual Defendants engaged in various acts of securities fraud. Specifically, Plaintiffs allege that the Defendants

misrepresented the company's revenues, profits, and subscribership numbers to the public and AOL's shareholders, in order to artificially inflate AOL's stock price. The Defendants also allegedly utilized improper accounting practices, such as listing advertising expenses as amortizable assets rather than costs in public financial reports, in order to present a false picture of the company's profitability and further boost the stock price. The Defendants, insiders at AOL, then illegally sold their individual stock for huge profits. Plaintiffs contend that these actions, occurring between 1992 and 1996, constitute a part of the widespread pattern of racketeering activity alleged throughout the Complaint.

The RICO statute originally included securities fraud among its list of predicate acts. 18 U.S.C. § 1961(1)(D) (1984 ed.). However, Congress amended RICO in 1995, through the Private Securities Litigation Reform Act, 18 U.S.C. § 1964(c) (1997 Supp.), to eliminate securities fraud as a predicate act for RICO claims, stating that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962." *See Rowe v. Marietta Corp.*, 955 F.Supp. 836 (W.D. Tenn. 1997) (dismissing RICO claim based on securities fraud); *Reading Wireless Cable Television Partnership v. Steingold*, 1996 WL 741432 (D. Nev. 1996) (same).

The Plaintiffs also attempt to package the Defendants' alleged stock-dumping practices as mail and wire fraud, which qualify as predicate acts of racketeering. See 18 U.S.C. § 1962(1). However, the

statute bars the consideration of conduct that "would have been actionable" as securities fraud. 18 U C. § 1964(c) (emphasis added). *See Krear v. Malek*, 961 F.Supp. 1065, 1974 (E.D. Mich 1997) ("Congress intended that conduct constituting wire and mail fraud not form the basis of a predicate act under the amendment if such conduct would also be actionable as securities fraud.") (emphasis added). The acts described by Plaintiff would be actionable, if at all, as securities fraud, and therefore cannot be considered as part of any RICO "pattern."

Additionally, the acts described fail the Supreme Court's test for "relatedness." The acts only relate to the other proposed predicate acts in the sense that they were all allegedly intended to enrich the Defendants. They did not have similar results, victims, or methods of commission. *See H. J.., Inc.*, 492 U.S. at 240. *See also Ticor Title Insurance Co. v. Florida*, 937 F.2d 447, 450 (9~ Cir. 1991) (to satisfy the relationship requirement, plaintiff must "show[] that the racketeering predicates 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'"). Most importantly for the question of "relatedness," the acts of securities fraud were allegedly perpetrated against shareholders, while Plaintiff's allegations of billing fraud claim injury to subscribers. Even if Defendants were somehow able to circumvent the recent RICO amendment discussed above, these unrelated allegations cannot be combined with Plaintiffs' other allegations to establish a pattern under RICO.

**c) Allegations concerning AOL's packaging supplier. PTP Industries, are unrelated to Plaintiffs' other claims and are not part of a "pattern" of activity under RICO.**

In Paragraphs 122-127 of the First Amended Complaint, the plaintiffs describe what they allege to be various fraudulent practices inflicted upon PTP Industries, Inc., a packaging and shipping company used by AOL. Plaintiffs allege that PTP was induced to dramatically expand its operations based on misrepresentations concerning AOL's shipping and packaging needs. Then, in 1996, Defendants slashed the volume of purchases from PTP when, according to Plaintiffs, AOL was financially unable to meet its forecasted product orders. AOL also switched from the packaging PTP had been supplying to an alternate packaging system, forcing PTP to close facilities in Nebraska and Texas.

Plaintiffs again attempt to argue that this conduct shows that fraudulent activity has been AOL's modus operandi over an extended period of time, manifested in a variety of ways. However, the plaintiffs do not explain what connection these acts have to the alleged pattern set out in the rest of the Complaint. These allegations fail the "relatedness" test set out in *H.J. Inc.*, and therefore cannot be used to help establish a "pattern" of RICO activity.

Nor do Plaintiffs explain how the Defendants' acts had any effect on the Plaintiffs. They therefore lack

standing to assert these claims. *See Sedima, S.P.RL. v. Imrex Co.*, 473 U.S. 479, 496-97, 105 S.Ct. 3275, 3285, 87 L.Ed.2d 346 (1985) (plaintiff only has standing under RICO to the extent that he has been injured by the conduct constituting the violation).

**d) Alleged fraud regarding AOL's "flat-fee" program was not continuous enough to form a "pattern" of racketeering activity under RICO.**

The only allegations remaining in Plaintiffs' Complaint describe a "flurry" of advertising for AOL's "flat fee" program. Plaintiffs allege in Paragraphs 128-153 of the Complaint that from October 1996 to February 1997, Defendants advertised through the mail on television, in magazines, and online, that customers could purchase "unlimited" access to AOL for a flat $19.95 monthly payment. According to Plaintiffs, AOL initiated this program with full knowledge that it did not have the ability to service all the customers who would pay the flat fee. Plaintiffs argue that each mailing and use of the wires constituted an act of mail or wire fraud, and that taken together, the acts constitute a "pattern" of racketeering activity. As described below (see Section A(3)), Plaintiffs have not set forth these allegations with the level of specificity required by Fed R. Civ.P. 9(b). However, even if the Court were to assume that the predicate acts had been set forth with sufficient particularity, Plaintiffs' claims would fail because their allegations fail to show that the predicate acts demonstrate closed-ended or

open-ended continuity, and therefore fail to demonstrate the required "pattern."

**(i) Plaintiffs have not established sufficient closed-ended continuity to establish a pattern under RICO.**

A pattern of racketeering activity demonstrated by showing closed-ended continuity requires "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 429 U.S. at 242. The allegations set forth in this portion of the Complaint describe a scheme that lasted only four or five months, an insufficient period of time to establish a "pattern."

According to the Supreme Court, "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the continuity] requirement." *H.J., Inc.*, 494 U.S. at 242 (emphasis added). The Ninth Circuit has held that "[a] pattern of activity lasting only a few months does not reflect the 'long term criminal conduct' to which RICO was intended to apply." *Religious Technology Center v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992) (holding that blackmail scheme lasting six months was insufficient to establish pattern).[5]

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[5] See also cases cited in *Wollersheim: Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 45-46 (1st Cir. 1991) (span of 34 months, absent threat of future criminal activity, is too short to support RICO claim); *Kehr Packages, Inc. v. Fidelcor, Inc.* 926 F.2d 1406, 1418 (3d Cir. 1991) (fraudulent scheme lasting 8 months did not

In fact, the Ninth Circuit has observed that "[w]e have found no case in which a court has held the [continuity] requirement to be satisfied by a pattern of activity lasting less than a year." *Wollersheim*, 971 F.2d at 366-67. Although the Ninth Circuit later cautioned in *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995) that a "bright line, one-year rule" is not consistent with the principle of flexibility enunciated by the Supreme Court, *id.* at 1528, the result in *Allwaste* did nothing to discredit the court's earlier observation. Only when the plaintiff asserted at a hearing on the defendant's motion to dismiss that it could show that the predicate acts occurred over a thirteen-month period did the court hold that he might be able to establish closed-ended continuity. *Id.*

While Plaintiffs allege that AOL committed numerous predicate acts between October 1996 and February 1997, by blitzing every major market in the United States with advertisements for the flat-fee program, the cases make clear that mere numbers are insufficient to establish a pattern under RICO. The predicate acts must occur over "a substantial period of time." *H. J. Inc.*, 429 U.S. at 242. Since AOL's flat-fee advertising campaign, lasting at most five months, cannot be considered "long-term" conduct, the court cannot find that these allegations establish closed-ended continuity.

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meet continuity test); *Parcoil Corp. v. Nowsco Well Serv., Ltd.*, 887 F.2d 502, 504 (4th Cir. 1989) (four months is insufficient to make out continuity); *Sutherland v. O'Malley*, 882 F.2d 1196, 1205 (7th Cir. 1989) (five month period is insufficient).

**(ii) Plaintiffs have not established sufficient open-ended continuity to establish a pattern under RICO.**

Plaintiffs are also unable to establish open-ended continuity, which requires a showing that the predicate acts "include a specific threat of repetition extending indefinitely into the future," or that "the offenses are sufficiently prevalent as to constitute an entity's "regular way of doing business." *H.J. Inc.*, 429 U. S. at 242. Plaintiffs allege that the Defendants' have conducted, and will continue to conduct, a practice of boosting subscribership far beyond the level at which it can provide the services promised. Plaintiffs assert that the Defendants make very little profit on subscribership fees, but receive substantial profit from advertising fees, which are generated by showing a large subscribership. They therefore argue that Defendants have promised, and will continue to promise, services they cannot deliver, in order to attract investment capital and advertising fees. While this analysis of AOL's profit structure may, if accurate, support an inference that Defendants will continue to seek a large subscribership, it does not establish the threat that AOL will use illegal means to meet this goal.

As recent Ninth Circuit cases on the question of "open-ended" continuity show, the fact that a defendant has allegedly committed acts of racketeering in the past is insufficient to warrant the conclusion that future conduct is threatened. Instead, the cases have hinged largely on the question of whether the pattern

of activity complained of was incomplete, so that the defendant could be expected to make further attempts to complete the scheme. The cases show that the duration of the alleged action is also critical, as with consideration of closed-ended continuity.

In *Schreiber Distrib Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393 (9th Cir. 1986), the court found that two predicate acts, furthering the diversion of a single shipment of goods, did not pose a threat of continuing activity because they occurred at nearly the same time, and because once those acts were complete, the defendant had no further need to commit predicate acts.

In *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187 (9th Cir. 1987), the president of a bank had received kickbacks from the bank's customers and deposited them into a fictitious account over a thirteen-month period. The plaintiff's RICO claim was based on four acts of mail fraud; the Defendant had allegedly sent letters to several government agencies attempting to conceal his wrongdoing. The Ninth Circuit reversed the district court's dismissal on the ground that these acts of mail fraud "covered up a whole series of alleged kickbacks and receipts of favors, occurred over several months, and in no way completed the criminal scheme." *Id.* at 194.

In *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990) the court found open-ended continuity existed based on two filings of false annual reports for a phantom commodity trading company, since "there [was] no evidence that [the defendant] would have stopped

[filing false annual reports] if [the company] had not ceased to do business." *Id.* at 309.

In *Allwaste, Inc. v. Hecht*, 65 F.3d 1523 (9th Cir. 1995) the court reasoned that the defendants' conduct presented a threat of future wrongdoing because the defendants, like the defendant in *Sun Savings and Loan*, had been involved in several kickback schemes lasting as long as thirteen months, and they "were not connected to the consummation of any particular transaction." The court determined that the defendants would likely have continued their actions if not for the fact that the Plaintiff intervened. *Id.* at 1529.

Plaintiffs' Complaint does not describe the type of scheme found to indicate a threat of future conduct in these cases. The Defendants' conduct lasted, at most, four or five months. There is no direct allegation that the Defendants had planned or threatened to continue the activity beyond February 1997, the date of the last alleged predicate act. There is no allegation, for example, that a fraudulent advertising blitz was to occur on an annual basis, like the false annual reports filed in *Ikuno*.

Nor do Plaintiffs' claims present indirect evidence from which the threat of continued activity can be inferred. The allegations concerning the flat-fee program do not describe several fraudulent schemes, as in *Allwaste* and *Sun Savings and Loan*. Although Plaintiffs claim that the Defendants promoted their "flat-fee" scheme by committing numerous acts of mail and wire fraud, these numerous individual acts essentially arose from the single decision to implement

and promote the new fee arrangement. The sheer numerosity of the acts arising from that decision is more a reflection of the size of the Defendant and the scope of its potential subscribership base, than an indication of a sustained series of decisions which would demonstrate that fraudulent activity is the company's regular way of doing business.

While a single racketeering episode may be sufficient to establish a "pattern" under RICO, *see Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), the number of separate attempts to defraud is a significant factor for the court to consider. *See Durning v. Citibank, Int'l*, 990 F.2d 1133, 1139 (9th Cir. 1993) (affirming dismissal of RICO claim and holding that RICO pattern not alleged where Defendants' "numerous related predicate acts" arose "from a single fraudulent event: the distribution of the misleading Official Statement;" finding of "isolated activity rather than an ongoing scheme which amounts to, or poses a threat of 'continued criminal activity'" not deterred by fact that case "involve[d] more than one victim of the alleged fraud."); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1533 (9th Cir. 1992) (affirming dismissal of § 1962(b) and (c) claims because "pattern" insufficient where employer's alleged retaliation for employee's articles and testimony amounted to "a single episode having the singular purpose of impoverishing [plaintiff]."); *Medallion Television Enterprises v. SelecTV of California, Inc.*, 833 F.2d 1360, 1365 (9th Cir. 1987) (continuity absent where case involved an "isolated, allegedly fraudulent inducement of [plaintiff] to enter the joint venture").

When only a single episode is alleged, it is reasonable to require that the episode must continue for a significant length of time. Continuity is, in either a closed-ended or open-ended inquiry, "centrally a temporal concept . . . ." *H.J., Inc.*, 492 U.S. at 242. Since Plaintiffs' allegations, when reduced to those acts properly considered "predicate acts," allege only a single episode of four or five months, providing no indication of a threat of continued activity, open-ended continuity is not shown. Plaintiffs therefore fail to establish a pattern of racketeering activity, and their RICO claims must be dismissed.

**3. Plaintiffs have not stated RICO allegations with sufficient particularity.**

Plaintiffs predicate their RICO claim mainly on allegations of mail fraud and wire fraud, which qualify as predicate acts of racketeering activity. 18 U.S.C. § 1962(1). Since the wire fraud statute, 18 U.S.C. § 1341, and mail fraud statute, 18 U.S.C. § 1343, have substantially the same language, the same analysis applies to each. *United States v. Berg*, F.Supp. 438, 440 (E.D.N.Y. 1989), citing *Carpenter v. United States*, 484 U.S. 19, 108 S.Ct. 316 (1987). The mail fraud statute, 18 U.S.C. § 1341, imposes criminal liability upon anyone who devises "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises," and uses the United States mails "for the purpose of executing such scheme or artifice or attempting so to do."

As the basis of their fraud claims, Plaintiffs allege that beginning in October, 1996, and continuing through February 1997, AOL launched an advertising blitz promoting its Flat Fee Program. AOL affirmatively represented that it had the infrastructure, modems, central computers and personnel to successfully provide unlimited online access to the AOL Enterprise and the Internet for its projected base of 8-10 million subscribers.

This advertising campaign was implemented through the following acts: AOL software disks and accompanying literature promising ease and unlimited AOL and Internet access were sent to millions of potential subscribers in a series of unsolicited interstate mailings and solicitations; on-line advertising was used to inform current subscribers of the Flat Fee Program, as well as to recruit new subscribers throughout the world through the Internet; existing subscriber arrangements were defaulted from $9.95 to $19.95 per month; and a national advertising campaign was instituted on radio, television and in the printed media.

AOL required subscribers to pay for the services offered and received either by giving AOL credit card information and authorization online or by authorizing AOL to debit a designated checking account, such authorization also being accomplished online. In both of these cases, interstate wire communication was utilized.

Plaintiffs allege that this activity was part of a scheme to defraud the public. Plaintiffs claim that Defendants knew they lacked the capacity to fulfill the

promises made in the letters and advertisements, but made promises in order to achieve a huge increase in AOL's membership. Defendants allegedly needed the increased membership in order to attract investment capital and advertising fees, and to boost AOL's stock value so that the individual defendants could sell their stock for substantial gains.

Plaintiffs further allege that because of the massive increase in AOL subscribers (in December 1996 alone, AOL online sessions increased from 6.2 million to 9.2 million daily), subscribers had slower connections to the Internet, busy signals, and were frequently unable to access the Internet. They claim that aside from being defrauded out of Internet access, many online businesses were defrauded out of profits when customers were unable to access their Internet sites. Plaintiffs also allege that such practices will continue in the future if Defendant is allowed to realize a profit from such activity.

According to Fed.R.Civ.P. Rule 9(b), "circumstances constituting fraud shall be stated with particularity." This rule is applicable to RICO claims, especially when mail fraud and wire fraud form the basis of a RICO claim. *See Alan Neuman Productions, Inc. v Albright*, 862 F.2d 1388, 1392 (9th Cir. 1988).

In the Ninth Circuit, "a pleading is sufficient for purposes of Rule 9(b) if it identifies the circumstances constituting fraud so that the defendant can prepare an adequate answer." *Zatkin v. Primuth*, 551 F.Supp. 39, 42 (S.D. Cal. 1982). Generally, the time, place and manner of each act of fraud must be alleged. *Bosse v. Crowell*

*Collier & McMillan*, 565 F.2d 602, 611 (9th Cir. 1977); *Lancaster Community Hospital v Antelope Valley Hospital District*, 940 F.2d 397, 405 (9th Cir. 1991).

Plaintiffs' allegations do not state claims for fraud with the requisite particularity. Statements such as "During the Fall of 1996," "in and around December, 1996," "on and aRer December 1, 1996," "during the months of December, 1996 and January, 1997" and "AOL continued advertising do not suffice. *See U.S. Concord, Inc. v. Harris Graphics Corp.*, 757 F.Supp. 1053, 1061 (N.D.Cal. 1991) ("Allegations such as '[d]uring the course of discussions in 1986 or 1987,' 'in or about May through December 1987,' and 'May 1987 and thereafter' do not make the grade.") (citation omitted).

Moreover, Plaintiffs do not attribute any allegedly fraudulent activity to any particular Defendants. This sort of "broad brush" pleading falls well short of the particularity required by Rule 9(b).

**4. Plaintiffs' First and Second Causes of Action fail to state a RICO Conspiracy**

In Plaintiffs' first and second causes of action, they allege that each defendant committed predicate acts of fraud in violation of RICO, and that each defendant conspired with each other defendant to conduct the enterprise through the commission of the predicate acts.

To state a conspiracy claim under RICO, a plaintiff must allege: (1) an agreement to conduct or participate in the affairs of an enterprise; (2) an

awareness of the essential nature and scope of the enterprise; and (3) an intent to participate in the RICO conspiracy. *Salinas v. United States*, ___ U.S. ___, 118 S.Ct. 469 (December 2, 1997); *Baumer v. Pachl*, 8 F.3d 1342, 1346 (9th Cir. 1993).

Plaintiffs' conspiracy claims contain none of these elements. Plaintiffs' conspiracy claims are merely conclusory allegations that each individual defendant and AOL "conspired with [the other] to violate 18 U.S.C. § 1962(c), in violation of 18 U.S.C. § 1962(d)." Plaintiffs do not allege that any defendants agreed to fulfill any particular role within a RICO enterprise, agreed to commit RICO predicate acts, or was aware of and intended to participate in a conspiracy.

Additionally, if a Plaintiff fails to establish the substantive elements of a RICO claim, a conspiracy claim cannot stand on its own. *See Religious Technology Center v. Wollersheim*, 971 F.2d 364 (9th Cir. 1992). A plaintiff's conspiracy claims under § 1962(d) also "stand or fall depending upon their claims under [§ 1962] (a) or (c)." *Gilbert v. Prudential-Bache Securities, Inc.*, 643 F.Supp. 107, 110 (E.D.Pa. 1986); *accord Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co.*, 639 F. Supp. 1532, 1537 (D. Mass. 1986). Since Plaintiffs' claims under the substantive provisions of RICO fail to state a claim, Plaintiffs' conspiracy claims fail as well.

**B. Plaintiffs' Third Cause of Action fails because AOL Ts Not Classified as a Common Carrier Under the Communications Act**

Plaintiffs' third cause of action charges Defendant AOL with violation of the Communications Act of 1934, 47 U. S.C. §§ 151 et seq. Plaintiffs claim AOL has violated the Act by (1) promulgating unjust or unreasonable charges, practices, classifications, or regulations in violation of 47 U.S.C. § 201(b), relating to services and charges; (2) giving unreasonable preferences or advantages to a particular person, class or persons or locality, thereby subjecting a particular person, class of persons or locality to unreasonable prejudice or disadvantage in violation of 47 U.S.C. § 202(b), relating to discrimination and preferences; and (3) failing to sufficiently protect subscriber privacy as required by the notice provisions of the Cable Communications Privacy Act, 47 U. S.C. § 551, relating to the protection of subscriber privacy.

These charges depend on the claim that defendant AOL is a "common carrier" as defined in the Communications Act, and is therefore subject to the Act's regulations. The Communications Act defines a "common carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier." 47 U.S.C. § 153(h).

**1. Courts have not classified Internet Service Providers as common carriers.**

The Supreme Court has defined a common carrier in the communications context as an entity which "makes a public offering to provide [communications facilities] whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing." *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 701 n.10 (1979). An essential characteristic of a common carrier is that it "does not make individualized decisions, in particular cases, whether and on what terms to deal." *Id.*

Neither the Supreme Court nor the Ninth Circuit has specifically decided whether Internet service providers (ISP's) such as AOL are to be considered common carriers.[6] In fact, only two courts have addressed the question specifically, and both have concluded that ISPs are not common carriers.

In *Religious Technology Center v. Netcom On-Line Communication Services, Inc.*, 907 F.Supp. 1361 (N.D.Cal. 1995), the court concluded that an Internet access provider, Netcom, did not fit within the definition of

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[6] The FCC considers AOL to be an ISP. *See, e.g*, Order, 11 FCC Rcd 21354 (1996), at par. 287, n. 3 87, 288. The FCC defines "ISPs" as "information service providers," while Defendants use the industry definition of "Internet service providers." This distinction does not alter the analysis, because the FCC treats Internet service providers as a subset of information service providers. *See, e.g.*, Order, __ FCC Rcd __ 1997 FCC Lexis 2591 (May 16, 1997) at par. 341 & n.498.

common carriers under the Copyright Act, which is analogous to the Communications Act definition.[7] Netcom provided nothing more than Internet access, but the court concluded that Internet access providers were not common carriers because they do "more than just 'provide the wire and conduits' . . . Further, Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to pass through them, as with the usual common carrier." *Id.* at 1370, n. 12. The court found that Netcom had suspended the accounts of subscribers who violated its terms and conditions, and concluded that Netcom was not a common carrier because common carriers "must not have any direct or indirect control over the context or selection of the primary transmission." *Id.*

The court in *CompuServe, Inc. v. CyberPromotions, Inc.*, 962 F.Supp. 1015 (S.D. Ohio 1997) noted that "Internet service providers have been held not to be common carriers." *Id.* at 1025. Relying partly on Religious Technology Center, the court held that CompuServe, an ISP and one of AOL's competitors, could not be viewed as a public utility, to which the public would have a right to reasonable access, because CompuServe did not provide an "essential good or service to the general public" and did not occupy a

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[7] The Copyright Act's definition of a common carrier is: "[A]ny carrier who has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist solely of providing wires, cables, or other communications channels for the use of others." 17 U.S.C. § 111(a)(3).

"monopolistic or oligopolistic position in the relevant marketplace." *Id.*

Defendants argue persuasively that, like Netcom and Compuserve, AOL has none of the characteristics of a common carrier. While common carriers act as passive conduits for information, Plaintiffs admit in their Complaint that AOL offers "a broad array of original and derivative programming and content." First Amended Complaint, ¶ 25. Additionally, while common carriers do not make individualized decisions whether and on what terms to deal, Plaintiffs acknowledge that "AOL has filed suit attempting to enjoin private providers of commercial advertising to AOL subscribers through e-mail." First Amended Complaint, ¶ 167. Under the Supreme Court's definition of common carriers, and applying the scant case law on the subject, the Court cannot find that AOL should be considered a common carrier.

**2. The FCC has refused to regulate Internet Service Providers as common carriers.**

The Court should defer to FCC pronouncements determining the scope of a statute it is charged to administer. See 47 U.S.C. § 151 (creating FCC to administer Communications Act). The Supreme Court has noted that because the term "common carrier" is not well defined in the Communications Act of 1934, "resort must be had to court and agency pronouncements to ascertain the term's meaning." *FCC v. Midwest Video Corp.*, 440 U.S. 689 n. 10 (1979); *see National Assoc. Of Regulatory Utility Comm'rs v. FCC*, 525

F.2d 630 (D.C.Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). The Supreme Court has also "repeatedly emphasized that the [Federal Communications] Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference." *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981); *See also Western Union Telegraph Co. v. FCC*, 541 F.2d 346, 351 (3d Cir. 1976) (deferring to FCC expertise in determining controversy involving "complex, sophisticated, and rapidly changing communications technology" and stating that the "Communications Act . . . is agency's expert province").

The FCC has not classified Internet Service Providers as common carriers subject to regulation under Title II of the Communications Act. The commission recently stated: "The definitional sections of [the Telecommunications Act of 1996] make clear that the term 'carriers' is synonymous with the term 'common carriers,' which does not include ISP's." Order, 11 FCC Rcd. 21905 (1997) at par. 267.

The FCC does not consider ISPs, such as AOL, to be common carriers because the FCC classifies ISP's as providers of "enhanced" services. *See* Order, __ FCC Rcd __ 1997 FCC LEXIS 2591 (May 16, 1997) at ¶¶ 341, 344, 345 ("enhanced services" include "access to the Internet and other interactive computer networks."); Order, 12 FCC Rcd. 87 (1996), at ¶ 782 (the FCC has "traditionally defined on-line and Internet services as enhanced services, and has not regulated [enhanced service providers] as common carriers."). Under the FCC's definitional scheme, providers of "enhanced" services are not providers of common carrier services,

and are not regulated under Title II of the Communications Act.[8] *See Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 213 (D.C. Cir. 1982)

The FCC classifies ISP's as non-common carrier "enhanced" service providers because they engage in information processing functions such as authentication, email storage and retrieval Web page hosting, and domain name server lookups "which involve substantial computer processing and interaction with customer-supplied information." K. Werbach, Digital Tornado: The Internet and Telecommunications Policy, March, 1997, FCC OPP Working Paper No. 29 at p.32-33. *See also* Order, 11 FCC Rcd. 21905, at ¶¶ 341, 343, 344.

The FCC's refusal to classify Internet service providers as "common carriers" stems from a desire to avoid "potentially detrimental effects on growth of the still-evolving information services industry" that would flow from such a classification. Order, __ FCC Rcd __ 1997 FCC Lexis 2591 (May 16, 1997), at ¶¶ 341, 343.

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**[8] The FCC distinguishes between "enhanced" and "basic" communications services. Basic services involve only information transport, while enhanced services include performing services on . :he transmitted information and providing stored information to subscribers. See 77 FCC 2d 384 (1980) at par. 86-94.**

### 3. Congress has refused to classify Internet Service Providers as common carriers.

Congress has also refused, in recent legislation, to classify ISPs as common carriers. The Telecommunications Act of 1996 specifically provides that "[n]othing in this section shall be construed to treat interactive computer services as common carriers or telecommunications carriers." 47 U.S.C. § 223(e)(6). As Defendants point out, such a statement would not be necessary if AOL and other ISP's were already considered common carriers. The 1996 Act sets out the reasons for this policy of restraint: "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

Accordingly, since the courts, the FCC, and Congress have refused to regulate Internet Service Providers as "common carriers" under the Communications Act, this Court must decline to impose such a classification. Plaintiffs' claim for violation of the Communications Act of 1934 must therefore be dismissed.

## C. Plaintiffs' Eight and Ninth Cause of Action for Declaratory and Injunctive Relief Do Not Allege Actionable Controversies and Present No Federal Questions

Plaintiffs eighth and ninth causes of action request declaratory and injunctive relief regarding a

variety of issues. The fundamental defect of Plaintiffs' declaratory relief claims is their failure to plead an actionable case or controversy.

Plaintiffs essentially present a laundry list of subjects on which they request judicial determination, without setting out the parties' conflicting positions with sufficient clarity to present an actionable case or controversy. As the Ninth Circuit has stated, "To allege an actual controversy within federal court jurisdiction under the Declaratory Judgment Act, [a plaintiff's] complaint must have alleged facts showing standing and ripeness." *Burlington Northern Railroad Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir 1991). *See also Stephenson v. Stephenson*, 249 F.2d 203, 208 (7th Cir. 1957) (an actual controversy exists "when one side makes a claim of a present, specific right and the other side makes an equally definite claim to the contrary.") Plaintiffs fail to present such a claim.

Moreover, a declaratory or injunctive relief claim cannot serve as an independent basis for federal jurisdiction. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950) (matter in controversy supporting request for declaratory judgment did not arise under federal law and could not serve as a basis for federal jurisdiction). Because Plaintiffs fail to allege a cognizable basis for declaratory or injunctive relief arising under federal law, Plaintiffs' declaratory and injunctive relief claims fail on this additional ground.

**1. Plaintiffs' reliance on purported constitutional issues is unavailing.**

Plaintiffs request declaratory relief concerning various acts alleged to impinge on the privacy interests of AOL subscribers. Specifically, Plaintiffs allege that AOL exposes its subscribers to commercial advertising, fails to warn subscribers that third parties may be able to access their computers; and declines to use readily available notices and effective prophylactic options to prevent these actual and potential invasions of privacy.

Plaintiffs' allegations concerning the right to privacy and to Dee speech, brought "under the First, Fourth, Fifth, and Ninth Amendments . . . as well as the Fourteenth Amendment" ignore a well-established prerequisite for any claim under these amendments: state action. The United States Constitution protects individuals only from government action, not private institutions such as AOL. *See New York State National Organization for Women v. Terry*, 886 F.2d 1339, 1358 (2d Cir. 1989).

Moreover, Plaintiffs' assertion that AOL has "assumed an affirmative duty in connection with the privacy expectations of its subscribers" does not establish the state action required to state a claim under the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *See Cyber Promotions, Inc. v. America Online, Inc.*, 948 F.Supp. 436, 443-44 (E.D.Pa. 1996 ) (holding that AOL is a private actor for purposes of First Amendment analysis); *Compuserve, Inc. v. Cyber Promotions, Inc.*, 962 F.Supp. 1015, 1025-26 (S.D. Ohio 1997) (holding that commercial online computer

services are private actors, and not public utilities under Ohio law). Because Plaintiffs' reliance on purported constitutional issues is unavailing, Plaintiffs' claims for declaratory and injunctive relief fail.

**2. Plaintiffs fail to raise a valid claim under federal copyright laws.**

Finally, Plaintiffs' ninth cause of action requests both declaratory and injunctive relief regarding the parties' standing under federal copyright law. Plaintiffs allege that Defendants assert rights to copyrights and other intellectual property rights from subscribers when they post protected material such as "screen names" on the Internet using Defendants' services.

A claim does not arise under federal copyright laws simply because the copyright may be the subject matter of the controversy. *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 826 (2d Cir. 1964), cert denied, 381 U.S. 915 (1965). A case arises under federal copyright laws:

> [I]f and only if the complaint is for a remedy expressly granted by the Act, e.g., a suit for infringement or for the statutory royalties for record reproduction, or asserts a claim requiring construction of the Act, or at the very least, and perhaps more doubtful, presents a case where a distinctive policy of the Act requires that federal principles control the disposition of the claim.

*Id.* at 828. Plaintiffs have not alleged an actual or threatened infringement of the Act. Rather, Plaintiffs seek declaratory relief as to whether the submission of materials "to any 'public area' of AOL . . . constitutes transfer of copyright ownership." First Amended Complaint, ¶ 260(3). Whether such submission constitutes such a transfer or not, there is no allegation that any copyright has been, or will be, infringed.

Since none of the claims asserted under Plaintiffs' claims for Injunctive and Declaratory relief presents an actionable controversy within federal jurisdiction, the Eighth and Ninth Causes of Action must be dismissed.

**D. Plaintiffs' Fourth. Fifth. Sixth and Seventh Causes of Action Under State Law Must Be Dismissed for Lack of Jurisdiction**

Since Plaintiffs' federal claims are dismissed, the state law claims must be dismissed as well. *See Jones v. Community Redev. Agency*, 733 F.2d 646, 651 (9th Cir. 1984) ("When federal claims are dismissed before trial . . . pendent state law claims also should be dismissed."); *see also Religious Technology Center*, 971 F.2d at 367-68 (affirming dismissal of pendent state claims following dismissal of RICO and copyright claims). There is no reason for the court to assert supplemental jurisdiction over Plaintiffs' state law claims. No discovery has been taken; no substantive rulings have been issued on any of the state law claims. The Court therefore declines to exercise supplemental jurisdiction over these claims.

## IV. CONCLUSION AND ORDER

In conclusion, Plaintiffs' nine causes of action fail to state a claim upon which relief can be granted for the following reasons:

I. Plaintiffs' First and Second Causes of Action Fail to State a Claim Under Any Section of RICO.

II. Plaintiffs' Third Cause of Action fails because AOL Is Not Classified as a Common Carrier Under the Communications Act.

III. Plaintiffs' Eight and Ninth Cause of Action for Declaratory and Injunctive Relief Do Not Allege Actionable Controversies and Present No Federal Questions.

IV. Plaintiffs' Fourth, Fifth, Sixth and Seventh Causes of Action Under State Law Must Be Dismissed for Lack of Jurisdiction.

Having made its findings of fact and conclusions of law, the Court hereby GRANTS Defendants' motion to dismiss the Amended Complaint in its entirety, with prejudice. Plaintiffs are free to refile these claims in state court.

The Clerk of the Court shall serve a copy of this Decision, and the Judgment to filed and entered hereafter, on all counsel of record.

IT IS SO ORDERED.

DATED: 5/14/98

The Honorable A. Andrew Hauk United States District Judge